No. 118

Brief of Jurisdiction for U.S.

Supreme Court of the United States.

Filed June 14, 1902.

OCTOBER TERM, 1901.

MISSOURI, KANSAS & TEXAS RAILWAY COMPANY, Plaintiff in Error,

vs.

JOHN S. ELLIOTT.

No. 118.

In Error to the Kansas City Court of Appeals of the State of Missouri.

STATEMENT, ARGUMENT AND BRIEF FOR THE PLAINTIFF IN ERROR.

GEO. P. B. JACKSON,
For Plaintiff in Error.

Fisse-Jones Ptg. Co., 316 Pine St., St. Louis, Mo.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1901.

MISSOURI, KANSAS & TEXAS RAILWAY COMPANY,
PLAINTIFF IN ERROR,
vs.
JOHN S. ELLIOTT.
No. 148.

In Error to the Kansas City Court of Appeals of the State of Missouri.

STATEMENT.

This writ of error is prosecuted to secure a review and reversal of the judgment of the Kansas City Court of Appeals of the State of Missouri, as the court of last resort in this case, on the theory that the case necessarily involved a Federal question, and that the decision was adverse to the plaintiff in error, denying the defendant a right and an

immunity claimed by it under the law and authority of the United States. The consideration of the case in this Court involves two questions: —

First, whether or not there was a Federal question in the case; and

Second, was it properly raised, so as to authorize this Court to review the judgment of the State court.

In order to a proper understanding I submit the following statement of the circumstances out of which this case originated and upon which the Federal question arose: —

In the year 1893 the defendant in error, Elliott, brought a suit against the Missouri, Kansas & Texas Railway Company in the Circuit Court of Cooper County, in the State of Missouri, to recover about $37,000.00, alleged to be due on account of ties furnished by Elliott to said company. The railway company, defendant in said case, duly removed the same to the United States Circuit Court for the Western District of Missouri (Rec., p. 27), where the plaintiff filed an amended petition at law to recover the amount claimed by him (Rec., p. 25). The defenses relied upon by the railway company requiring a resort to the Equity side of the Court, it became necessary to file a bill in equity to set aside and vacate certain reports of inspections of ties claimed to have been procured through fraud and mistake, and as an incident to said bill in equity the railroad company prayed that the prosecution of the action at law should be enjoined until the determination of the suit in equity. The Chancellor granted a temporary injunction on condition that the railroad company furnish a bond in the sum of $20,000.00 (Rec. p. 6), which was done (Rec., p. 7), and after due proceedings a decree was entered in the United States Circuit Court, granting substantially the relief prayed by the railroad company, and the injunction against the prosecution of the action at law was made perpetual (Rec., p. 9).

Afterwards Elliott, as defendant in that case, prosecuted an appeal to the United States Circuit Court of Appeals, where the decree of the Circuit Court was reversed; and subsequently, on Oct. 19th, 1896, the plaintiff's bill was dismissed (Rec., p. 10).

Afterwards the defendant in error, Elliott, instituted the present suit in the Circuit Court of Cooper County, Mo., returnable to the October Term, 1897, the same being a suit upon a copy of the injunction bond, alleging that the bond was given in pursuance of an order of the United States Circuit Court in the equity case formerly pending therein (the original bond not being filed because it was on file and a part of the record in the United States court); that the injunction had been dissolved; that the defendant had suffered damages in that he had expended a large amount for attorneys' fees, which it was alleged he was entitled to recover on that bond, and then prayed judgment for the penalty of the bond, to be satisfied by payment of $2,000, the damages claimed (Rec., pp. 2–4). To this defendant answered admitting the pendency of the suit in equity in the United States court, the giving of the bond as alleged in that case, and in that court, and the dissolution of the injunction, and alleging farther that the purpose of the injunction was to suspend the prosecution of an action at law while the defendant asserted rights which it claimed, and which could only be established in a court of equity, and then, in accordance with the practice prevailing in the Missouri courts, denied each and every other allegation in the petition, which was equivalent to the specific denial of the allegation that the plaintiff was entitled to recover attorneys' fees as damages on that injunction bond given in the United States court (Rec., p. 4). The case was tried before the court without a jury. At the instance of the plaintiff, and over the objection of the defendant, the court declared the law to be

"that the execution of the bond sued on and the dissolution of the injunction referred to therein are admitted by the parties, and plaintiff is entitled to recover his reasonable personal expenses and attorneys' fees incurred for services of attorneys in procuring the dissolution of said injunction." (Rec., p. 36.)

The defendant asked, and the court refused to give, the following instructions: —

I.

"The court declares the law to be that under the pleadings and evidence the plaintiff is not entitled to recover, and the finding must be for the defendant."

II.

"The court declares the law to be that the plaintiff is not entitled to recover as damages on the injunction bond sued on any sum which he may have paid out or become liable for as attorneys' fees."

VI.

"The court declares the law to be that the plaintiff is not entitled to recover as damages on the injunction bond sued on in this case any amounts which he may have paid out or become liable for as attorneys' fees for services rendered by his attorneys in the equity suit in the United States court mentioned in the pleadings and evidence in connection with the issue in regard to the correctness of the inspection of the ties mentioned therein, nor for the purpose of sustaining the inspection originally made, and upon which the plaintiff had brought his action at law, which was referred to in said equity suit." (Rec., p. 37.)

The other instructions referred to certain other defenses and are not necessary to be mentioned here).

There was a judgment for the plaintiff, defendant in error here (Rec., p. 5). In due time the railway company filed a motion for new trial, on the ground that the court had committed error in giving illegal and improper instructions for the plaintiff, and refusing to give legal and proper instructions for the defendant, and because the judgment was contrary to law (Rec., p. 38). This motion was overruled and exceptions saved, and the defendant filed its bill of exceptions (Rec., p. 39), and in due time the defendant railway company filed its affidavit and bond for appeal, and the Circuit Court ordered the case certified to the Kansas City Court of Appeals (Rec., p. 2). In conformity with the statute and the rule of court, a printed copy of the record of proceedings in the Circuit Court was duly filed in the Kansas City Court of Appeals (Rec., pp. 2–39). Under the law of the State no "assignment of errors" is required, but in lieu thereof and in conformity with the State statute and the rule of court pursuant thereto, there was presented to and filed in the Court of Appeals the brief of the appellant, which under the statute and rule of court consists of a numerical arrangement of points relied upon, with the citation of authorities under each, and such printed argument as the party desires to submit in connection therewith. In this brief, in points 1, 2 and 3 (Rec., pp. 42–43) and in the elaboration thereof (Rec., pp. 48–52), the appellant submitted the proposition that attorneys' fees could not be recovered upon the bond sued on, for the reason that said bond had been given in a United States court, in pursuance of an order of such court, requiring the same, and that the rules of the court, as construed by the decisions of this Court, entered into and became a part of the contract of the bond and established the measure of liability on such bond, and that the law and rules of the

courts of the United States which fixed the measure of liability on the bond excluded attorneys' fees as an element of damage on such bond.

Likewise, in compliance with the statute and rule of court, the respondent, Elliott filed his brief, by point 5 of which (Rec., p. 60) and the enlargement upon same (p. 64) the appellant's contention was resisted, and it was claimed that, notwithstanding the rule prevailing in the Federal Courts, which excludes attorney's fees as an element of damages on an injunction bond, and notwithstanding such damages could not be recovered if the bond was sued on in a Federal court, yet such rule of the Federal court could not control the State court in its judgment in this case.

The case was submitted to the Kansas City Court of Appeals upon these briefs, and subsequently that court rendered a judgment and filed an opinion confirming the judgment of the Circuit Court of Cooper County (Rec. 65–69). In this opinion the Kansas City Court of Appeals stated its understanding of the question submitted by the record in the case as follows: —

"Defendant's objections to the judgment below may be thus stated: —

> 1. That there was no breach of the conditions of the bond, in that it was not alleged or proved that any damages had been previously adjudged against the defendant, whereas the condition of the bond is that the defendant should pay "all sums of money, damages and costs that shall be adjudged against it," etc.
>
> 2. *It is contended that as the injunction bond was given in a proceeding pending in the United States court, the damages must be fixed and determined according to the rules and practice of the Federal court: that attorneys' fees are not there considered elements of damages in suits on injunction bonds, and that therefore our State courts should apply the same rule on bonds given in the Federal courts.*

3. It is insisted that the trial court erroneously allowed as damages attorneys' fees for defending the entire case; that the injunction was merely incidental to the principal case, and no attorneys' fees were paid to secure its dissolution." (Rec., p. 66.)

In disposing of the second contention that court said, in the opinion: —

"II. The second position of defendant's able counsel is also untenable. His contention is that plaintiff is not entitled in a suit on this bond to recover, as an element of damages, the fees paid attorneys in defending against the injunction suit. It is conceded as a general proposition, that under the laws of Missouri, as announced by its courts, and indeed as decided by nearly every State in the Union, counsel fees are recoverable as damages on an injunction bond. But it is claimed that because this bond was made in a suit at the time pending in the Federal court, no attorneys' fees should be allowed because contrary to the holding of such courts in like cases.

"Reason and authority, we think, stand opposed to this contention."

For the purpose of establishing that the Kansas City Court of Appeals is the highest tribunal of the State in which this case could be determined, reference is made to the fact that the appellant, railway company, sought to have the case transferred to the Supreme Court of the State, but the application was denied (Rec., pp. 71–90), and afterwards the railway company also instituted in the State Supreme Court a proceeding of "Prohibition" under the Missouri Statute, whereby it unsuccessfully endeavored to suspend the proceeding in the Kansas City Court of Appeals and have the case certified to the Supreme Court (see exhibits attached to the petition for writ of error, and the case of M., K. & T. Ry. Co. *v.* Smith et al., 154 Mo. 300).

The appellate jurisdiction in the State of Missouri is vested in the Supreme Court and in the Kansas City Court of Appeals and the St. Louis Court of Appeals, by virtue of the following sections of Article VI. of the Constitution of the State and of the Amendment of 1884 thereof: —

"SECTION 2. SUPREME COURT — JURISDICTION OF. — The Supreme Court, except in cases otherwise directed by this Constitution, shall have appellate jurisdiction only, which shall be co-extensive with the State, under the restrictions and limitations in this Constitution provided." (R. S. Mo. 1899, p. 86.)

Section 12 is as follows: —

"SEC. 12. ST. LOUIS COURT OF APPEALS — JURISDICTION — APPEALS TO SUPREME COURT. — There is hereby established in the city of St Louis an appellate court, to be known as the 'St. Louis Court of Appeals,' the jurisdiction of which shall be co-extensive with the city of St. Louis and the counties of St. Louis, St. Charles, Lincoln and Warren. Said court shall have power to issue writs of *habeas corpus*, *quo warranto*, *mandamus*, *certiorari*, and other original remedial writs, and to hear and determine the same; and shall have a superintending control over all inferior courts of record in said counties. Appeals shall lie from the decisions of the St. Louis Court of Appeals to the Supreme Court, and writs of error may issue from the Supreme Court to said court in the following cases only: In all cases where the amount in dispute, exclusive of costs, exceeds the sum of two thousand, five hundred dollars; in cases involving the construction of the Constitution of the United States or of this State; in cases where the validity of a treaty or

statute of or authority exercised under the United States is drawn in question, in cases involving the construction of the revenue laws of this State, or the title to any office under this State; in cases involving title to real estate; in cases where a county or other political subdivision of the State or any State officer is a party, and in all cases of felony." (R. S. Mo. 1899, p. 87.)

This Constitution went into effect in November, 1875, and the appellate courts were as provided in the two above sections until the Amendment of 1884. Under the scheme of the two sections above set forth, all appeals from the various courts in the State, except from the city of St. Louis and the counties of St. Charles, Lincoln and Warren, went originally to the Supreme Court, and in the above named city and counties appeals first went to the St. Louis Court of Appeals, with the right of appeal to the Supreme Court when the amount was in excess of $2,500.00 or when the case involved a constitutional question or where the validity of a treaty or statute of, or authority exercised under, the United States, was drawn in question, etc. In all other cases the judgments of the St. Louis Court of Appeals were final.

In 1884 the Constitution was amended so as to create another Court of Appeals, known as the Kansas City Court of Appeals, and the jurisdiction of the St. Louis Court of Appeals was extended over the eastern portion of the State, while the Kansas City Court of Appeals was given jurisdiction over the western portion. Appeals from the Circuit Courts in all cases not involving over $2,500.00, and not of the character of cases which were formerly appealable to the Supreme Court from the St. Louis Court of Appeals by virtue of Sec. 12, previously quoted, went directly to the Courts of Appeals, and the judgments of

such courts of appeals were final, subject to the superintending control of the Supreme Court, as appeared by the following sections of the Amendment of 1884: —

"SEC. 1. ST. LOUIS COURT OF APPEALS — EXTENDED JURISDICTION.—The jurisdiction of the St. Louis Court of Appeals is hereby extended so as to be co-extensive with the counties of * * * (Naming about half the counties in the State)". (R. S. Mo. 1899, p. 92.)

"SEC. 2. KANSAS CITY COURT OF APPEALS — JURISDICTION — TERMS — JUDGES.— There is hereby established at Kansas City an appellate court, to be known as the Kansas City Court of Appeals, the jurisdiction of which shall be co-extensive with all the counties in the State except those embraced in the jurisdiction of the St. Louis Court of Appeals. * * *" (R. S. Mo. 1899, p. 93.)

"SEC. 5. SUPREME COURT — EXCLUSIVE APPELLATE JURISDICTION OF.— In all causes or proceedings reviewable by the Supreme Court, writs of error shall run from the Supreme Court directly to the Circuit Courts, and to courts having the jurisdiction pertaining to Circuit Courts, and in all such causes or proceedings, appeals shall lie from such trial courts directly to the Supreme Court, and the Supreme Court shall have exclusive jurisdiction of such writs of error and appeals, and shall in all such cases exclusively exercise superintending control over such trial courts." (R. S. Mo. 1899, p. 93.)

"SEC. 6. COURTS OF APPEALS CASES MAY BE CERTIFIED TO SUPREME COURT, WHEN. — When any one of said courts of appeals shall in any cause or proceeding render a decision which any of the judges therein sitting shall deem contrary to any previous decision of any one of said courts of appeals, or of the Supreme Court, the said Court of Appeals must, of its own motion, pending the same term, and not afterward, certify and transfer said cause or proceeding and the original transcript therein to the Supreme Court, and thereupon the

Supreme Court must rehear and determine said cause or proceeding, as in case of jurisdiction obtained by ordinary appellate process; and the last previous rulings of the Supreme Court on any question of law or equity shall, in all cases, be controlling authority in said courts of appeals." (R. S. Mo. 1899, p. 93.)

SEC. 8. SUPREME COURT — SUPERINTENDING CONTROL OF. — The Supreme Court shall have superintending control over the courts of appeals by mandamus, prohibition and *certiorari*." (R. S. Mo. '99, p. 94.)

The Kansas City Court of Appeals was thus shown to be the court of last resort for this case. This is put beyond any possibility of question by the stipulation which is filed and printed by way of supplement to the record formerly printed in the case, as follows: —

In the Supreme Court of the United States.

October Term, 1901.

No. 148.

Missouri, Kansas & Texas Railway Company,
Plaintiff in Error.

vs.

Jonh S. Elliott.

In Error to the Kansas City Court of Appeals of the State of Missouri.

STIPULATION.

It is hereby stipulated by and between the above named parties, herein acting by their respective attorneys, that, in order to relieve the court of unnecessary labor and to avoid incumbering the record and printing a large amount of

matter pertaining to the effort of the plaintiff in error (defendant below) to have the case determined in the Supreme Court of the State of Missouri, the following statement may be accepted as covering said matters, as the same now appear from the exhibits attached to the petition for writ of error and now on file as part of the record in this case; and in lieu thereof this stipulation may be printed as a supplement to the portion of the record already printed.

It is agreed that in the State of Missouri the appellate jurisdiction is vested in a Supreme Court and in the St. Louis and Kansas City Courts of Appeals; that the latter has jurisdiction of appeals from Cooper County which are not returnable to the Supreme Court; that at the time of the appeal in the case of Elliott *v.* Missouri, Kansas & Texas Railway Company the Supreme Court of the State had appellate jurisdiction over all cases involving $2,500.00, exclusive of costs, and cases involving the construction of the Constitution of the United States or of the State of Missouri, or where the validity of a treaty or statute of, or authority exercised under, the United States is drawn in question, and cases involving the construction of the revenue laws of Missouri, or the title to any office under that State, and the cases involving the title to real estate, or those where a county or other political subdivision of the State, or any officer, is a party, and in all cases of felony (Amendment, Mo. Const., 1884, Sec. 5, and Art. VI, Sec 12); and also had superintending control over the Courts of Appeals by mandamus, prohibition and certiorari (Amendment, Mo. Const., 1884, Sec. 8); and that the Courts of Appeals had final appellate jurisdiction in all other cases. Appeals do not lie from the Courts of Appeals to the Supreme Court, nor writs of error from the Supreme Court to the Courts of Appeals. The amount of the judgment in the case of Elliott *v.* Missouri, Kansas and Texas Railway Company, would make the case returnable to the Kansas City Court of Appeals, unless it involves the construction of the Constitution of the United States or of the State of Missouri, or is a case where the validity of a treaty or statute of or authority exercised under the United States is drawn in question, while if it involved any such question the appeal in that case would

have been returnable to the Supreme Court. After the decision of the Kansas City Court of Appeals the appellant, Missouri, Kansas & Texas Railway Company, filed a motion for rehearing and to transfer the case to the Supreme Court, which motion was overruled, and afterwards said railroad company commenced an original proceeding in the Supreme Court of the State of Missouri, against the Judges of the Kansas City Court of Appeals, seeking to prohibit said Judges and said Court from farther proceeding in the case, and to cause the same to be certified to the Supreme Court, the prayer of the petition in said proceeding being as follows :—

"Wherefore your petitioner prays the remedy of the writ of prohibition to the said Jackson L. Smith, and to the said James Ellison, and to the said Turner A. Gill, as Judges of the said Kansas City Court of Appeals, prohibiting them from proceeding any farther in the matters aforesaid, and from certifying their said opinion in the case of John S. Elliott *v.* Missouri, Kansas and Texas Railway Company to the said Circuit Court of Cooper County, Missouri, or from issuing or transmitting any mandate in said case to said Circuit Court of Cooper County, or from authorizing the said Circuit Court to proceed in any manner or to any extent in the said cause, and prohibiting the said respondents from in any manner or to any extent carrying out their judgment, decision and opinion in the said case of John S. Elliott *v.* Missouri, Kansas & Texas Railway Company, and to the end that complete justice may be done to your petitioner it farther prays that the said writ may be so framed as to command the said respondents to certify and transmit to this court the record and proceedings in the aforesaid case of John S. Elliott *v.* Missouri, Kansas & Texas Railway Company, heretofore pending in said Kansas City Court of Appeals, and to annul any prior proceedings of the respondents as Judges of said Kansas City Court of Appeals in said last named case."

After due proceedings in accordance with the practice in the Supreme Court and in such cases, the Supreme Court refused to grant the prayer of said petition, and denied the relief therein prayed for, and filed an opinion in said case, which is reported in 154 Mo. 300.

There was no other proceeding or means by which the

case might have been taken before the Supreme Court of the State of Missouri, or judgment of said Court secured in said case.

GEO. P. B. JACKSON,
Attorney for Plaintiff in Error.

WILLIAM M. WILLIAMS,
Attorney for Defendant in Error.

Thereafter the railway company filed in the Kansas City Court of Appeals its assignment of errors, for the purpose of having the judgment of said Kansas City Court of Appeals reversed upon writ of error from this court, as follows: —

"The said Kansas City Court of Appeals erred: —

I.

In holding and deciding that it had jurisdiction of the above-entitled cause.

II.

In holding and deciding that there was no Federal question involved in this case.

III.

In holding and deciding that the liability upon the injunction bond sued on, which had been given in the United States Circuit Court, was subject to the law of the State, and that the measure of the liability upon such bond was not to be determined by the laws or decisions of the courts of the United States.

IV.

In holding and deciding that attorneys' fees could be allowed as damages in an action upon an injunction bond given in a suit pending in a United States Circuit Court.

V.

In holding and deciding that it, the said Kansas City Court of Appeals, was not bound by nor required to follow the rulings and decisions of the Supreme Court of the United States concerning the liability upon injunction bonds given in cases pending in United States Circuit Courts.

VI.

In holding and deciding that the laws of the State of Missouri authorized the recovery of attorneys' fees as damages in a suit upon an injunction bond given in the Circuit Court of the United States."

(Record, p. 91.)

Writ of error issued, and due return has been made thereto (Record, pp. 92 and 93). Bond was given and approved (Record, p. 93), and citation was duly served (Record, p. 94).

GEO. P. B. JACKSON,
For Plaintiff in Error.

POINTS.

I.

1. The case involves a Federal question, because the construction of the contract evidenced by the Injunction Bond, draws in question an authority exercised under the United States, and because the measure of liability upon that bond depends upon the laws of the United States, and rules of court made by authority of such laws.

Bein *v.* Heath, 12 How. 168;
Osborn *v.* Bank of U. S., 9 Wheat. 817;
Myers *v.* Block, 120 U. S. 206;
Aiken *v.* Leathers, 40 La. Ann. 23;
Leslie *v.* Brown, 90 Fed. 171; 56 U. S. Ct. of Ap. Rep. 727;
Johnson *v.* Christian, 125 U. S. 642;
Lacassagne *v.* Chapins, 144 U. S. 119;
R. R. *v.* Briscoe, 144 U. S. 133;
R. R. *v.* Amato, 144 U. S. 465;
R. R. *v.* Cox, 145 U. S. 593;
Carey *v.* R. R., 161 U. S. 115;
R. R. *v.* Harber, 169 U. S. 613-622;
Wood *v.* Drake, 70 Fed. 881;
Walker *v.* Bank, 56 Fed. 76;
Houser *v.* Clayton, 3 Woods, 273;
Johnson *v.* Banking Assn., 33 La. Ann. 479;
Bock *v.* Perkins, 139 U. S. 628;
Feibelman *v.* Packard, 109 U. S. 421;
Live Stock Co. *v.* Butchers' Union, 120 U. S. 141.

2. Attorneys' fees are not recoverable on injunction bonds given in the United States courts.

Oelrichs *v.* Spain, 15 Wall. 211;
Bein *v.* Heath, 12 How. 168.

3. There can be no recovery of damages in an injunction suit except on the injunction bond. The right of recovery depends entirely upon the bond.

St. Louis *v.* St. Louis Gas Co., 82 Mo. 349;
Teasdale *v.* Jones, 40 M. A. 243;
Campbell *v.* Carroll, 35 M. A. 640;
Keber *v.* Bank, 4 M. A. 195.

4. The law in force at the time the bond is made is to be considered as incorporated in it, and a part of the contract.

Mix *v.* Vail, 86 Ill. 40;
2 Am. & Eng. Enc. of Law, 466g and 466i.

5. Where there is no statute prescribing the conditions of the bond, they are determined by the rules of the court and the discretion of the chancellor.

Murfree on Official Bonds, Sec. 401;
Newell *v.* Partee, 10 Humph. (Tenn.) 325;
Nolan *v.* Johns, 27 M. A. 502;
Rubelman Hdw. Co. *v.* Greve, 18 M. A. 6.
Teasdale *v.* Jones, 40 M. A. 243;
Kinealy *v.* Stead, 55 M. A. 176, 180.

6. The bond is a part of the record in the case and of the court in which it is given.

Pickett *v.* Boyd, 11 Lea (Tenn.), 498–503;
Murfree on Official Bonds, Sec. 401.

Therefore the rules and practice in the Federal court entered into and became a part of the bond sued on in this case.

II.

The question was so presented as to authorize this court to review the judgment of the State court.

1. It was so necessarily involved in the case stated in the petition and in the defense relied upon that the court could not render judgment without passing upon the effect of the authority exercised by the United States Circuit Court in which the bond sued on was given.

Cases cited under Point I. and
R. R. *v.* Chicago, 166 U. S. 226;
Oxley Stave Co. *v.* Butler Co., 166 U. S. 648;
Kipley *v.* Illinois ex rel., 170 U. S. 182;
R. R. *v.* Homestead Co., 123 U. S. 552;
Bridge Prop's *v.* Land and Imp. Co., 1 Wall. 116;
Furman *v.* Nichol, 8 Wall. 44.

2. The entire record, as originally filed in the Kansas City Court of Appeals, taken altogether, shows that there was drawn in question an authority exercised under the United States, and that the defendant railway company was claiming an immunity from liability for attorney's fees as damages on the injunction bond sued on, by virtue of the laws of the United States and the rules of the United States court as construed and applied by this court.

3. Under the decisions and "Code of Civil Procedure," of the State of Missouri (Laws of Missouri, 1889, pp. 205–210; and Vol. 1, Rev. Stat. of Mo. 1889, pp. 296–304), the briefs filed in the Kansas City Court of Appeals became part of the Record in the case, and may properly be resorted to to ascertain

what questions were presented for determination. The briefs of counsel on both sides filed in that court clearly show that the Federal question previously mentioned was distinctly presented, and the immunity claimed by the appellant and resisted by the respondent.

Formerly the practice in Missouri required an appellant or plaintiff in error to file assignments of error in the appellate court, and also required joinder in error by the respondent (Secs. 3764 and 3765, Revised Statutes of Mo. 1879), but in the revision of the Code of Practice of Missouri, made in 1889, these sections were omitted and there was no provision made requiring such assignment of errors to be filed. See Art. XII., entitled "Of Practice in the Supreme Court and Courts of Appeals," Rev. Stat. of Missouri, 1889, pp. 585 to 593 (1 R. S. of Mo. 1899, pp. 296 to 304).

Sec. 2301, Rev. Stat. of Mo. 1889 (being Sec. 863, Vol. 1, Rev. Stat. of Mo. 1899), reads as follows: —

> "SEC. 2301. STATEMENT AND BRIEF TO BE FILED. WHEN. — On appeals and writs of error each party shall, on or before the day next preceding the day on which the cause is docketed for hearing, make out and furnish the court with a clear and concise statement of the case, and the points intended to be insisted on in argument."

The rules governing practice in the Kansas City Court of Appeals, adopted in pursuance of this statute, are found at the end of each volume of the Missouri Appeal Reports.

No provision is made in these rules for an assignment of errors, other than that required in the briefs by Rules 15 and 17, which are as follows: —

> "RULE 15. ABSTRACT AND BRIEFS TO BE FILED AND SERVED. — In all cases the appellant or plaintiff in

error shall file with the clerk of this court, on or before the day next preceding the day on which the cause is docketed for hearing, five copies of a printed abstract or abridgment of the record in said cause, setting forth so much thereof as is necessary to a full understanding of all the questions presented to this court for decision, together with a brief containing in numerical order, the points or legal propositions relied on, with citation of such authorities as counsel may desire to present in support thereof."

"RULE 17.—APPELLANT'S BRIEF TO ALLEGE ERRORS COMPLAINED OF.— The brief on behalf of appellant or plaintiff in error shall distinctly and separately allege the errors committed by the inferior court, and no reference will be permitted in the oral argument to errors not thus specified, nor any reference by either counsel to any authority not cited in his brief, unless for good cause shown the Court shall otherwise direct."

See Appendix to Vol. 77 Mo. Ap. Rep.

In view of this change of the statute it has been ruled that "It is not now required to assign and join error more than such assignment may be made by briefs required by Section 2301 of the late revision — 1889 — (being Sec. 863, R. S. Mo., 1899).

Donnell Mfg. Co. *v.* Hart, 40 M. A. 512;
Mo. Valley Stone Works *v.* Brown, 50 M. A. 407–413.

By virtue of these statutory provisions of the State governing the practice of the appellate courts, and of the reasoning of this Court with reference to the opinions of the State courts, the briefs of counsel become part of the record for the purpose of ascertaining what questions were presented in the State court.

Murdoch *v.* Memphis, 20 Wall. 590–633.
Gross *v.* Mortgage Co., 108 U. S. 477;
Sayward *v.* Denny, 158 U. S. 180.

4. The opinion of the Kansas City Court of Appeals is part of the record in the case by virtue of Section 15, Article VI, Constitution of Missouri, which reads: —

> "The opinions of said court shall be in writing, and shall be filed in the cases in which they shall be respectively made, and *become parts of their record;* and all laws relating to the practice in the Supreme Court shall apply to this court, so far as the same may be applicable." (1 R. S. Mo. 1889, p. 88.)

Also under Rule 8 of this court the opinion of the State court is a part of the record for the purpose of ascertaining what points were presented to and decided by that court.

Egan *v.* Hart, 165 U. S. 188.

The opinion of the Kansas City Court of Appeals clearly shows that the Federal question was raised and was decided adversely to the contention of plaintiff in error, and the right and immunity claimed by plaintiff in error, under the rules and authority of the United States Circuit Court, were denied.

III.

The Kansas City Court of Appeals is the highest court in the State of Missouri in which a decision could be had in the case of Elliott *v.* Missouri, Kansas & Texas Railway Company.

That court denied the motion to transfer the case to the Supreme Court,— while the Supreme Court refused to cause the case to be certified from the Court of Appeals upon a petition for that purpose.

Gregory *v.* McVeigh, 23 Wall. 294;
Stanley *v.* Schwalby, 162 U. S. 255;
Bacon *v.* Texas, 163 U. S. 207.

Const. of Mo., Art. VI, Secs. 2 and 12 (1 R. S. Mo., 1899, pp. 86 and 87), which read as follows: —

"Sec. 2. **Supreme Court — Jurisdiction of.**— The Supreme Court, except in cases otherwise directed by this Constitution, shall have appellate jurisdiction only, which shall be co-extensive with the State, under the restrictions and limitations in this Constitution provided."

"Sec. 12. **St. Louis Court of Appeals — Jurisdiction —Appeals to Supreme Court.**— There is hereby established in the city of St. Louis an appellate court, to be known as the "St. Louis Court of Appeals," the jurisdiction of which shall be co-extensive with the city of St. Louis, and the counties of St. Louis, St. Charles, Lincoln and Warren. Said court shall have power to issue writs of *habeas corpus*, *quo warranto*, *mandamus*, *certiorari*, and other original remedial writs, and to hear and determine the same; and shall have a superintending control over all inferior courts of record in said counties. Appeals shall lie from the decisions of the St. Louis Court of Appeals to the Supreme Court, and writs of error may issue from the Supreme Court to said court in the following cases only: In all cases where the amount in dispute, exclusive of costs, exceeds the sum of two thousand five hundred dollars; in cases involving the construction of the Constitution of the United States or of this State; in cases where the validity of a treaty or statute of or authority exercised under the United States is drawn in question; in cases involving the construction of the revenue laws of this State, or the title to any office under this State; in cases involving title to real estate; in cases where a county or other political subdivision of the State or any State officer is a party, and in all cases of felony."

Amendment, Mo. Const. of 1884, Secs. 1, 2, 5, 6 and 8 (1 R. S. Mo. 1899, pp. 92, 93 and 94), which read as follows: —

"SECTION 1. **St. Louis Court of Appeals—Extended Jurisdiction.**— The jurisdiction of the St. Louis Court of Appeals is hereby extended so as to be co-extensive with the counties of Monroe, Shelby, Knox, Scotland, Clark, Lewis, Marion, Ralls, Pike, Lincoln, Warren, St. Charles, St. Louis, Jefferson, Ste. Genevieve, Perry, Cape Girardeau, Scott, Mississippi, New Madrid, Pemiscot, Dunklin, Stoddard, Wayne, Bollinger, Madison, St. Francois, Washington, Franklin, Crawford, Iron, Reynolds, Carter, Butler, Ripley, Oregon, Shannon, Dent, Phelps, Pulaski, Texas, Howell, Ozark, Douglas, Wright, Laclede, Webster, Christian, Taney, Stone, Greene, Lawrence, Barry, Newton and McDonald, as well as the city of St. Louis; and each judge thereof, when hereafter elected, shall be elected by the qualified voters of the counties and of the city under the jurisdiction of said court, and shall be a resident of the said territorial appellate district."

"Sec. 2. **Kansas City Court of Appeals — Jurisdiction, Terms, Judges.** — There is hereby established at Kansas City an appellate court, to be known as the Kansas City Court of Appeals, the jurisdiction of which shall be co-extensive with all the counties in the State except those embraced in the jurisdiction of the St. Louis Court of Appeals. There shall be held in each year two terms of said Kansas City Court of Appeals, one on the first Monday of March and one on the first Monday of October. The Kansas City Court of Appeals shall consist of three judges, who shall be elected by the qualified voters of the counties under the jurisdiction of said court, and shall be residents of said territorial appellate district."

"Sec. 5. **Supreme Court — Exclusive Appellate Jurisdiction of.** — In all causes or proceedings reviewable by the Supreme Court, writs of error shall run from the Supreme Court directly to the Circuit

Courts and to courts having the jurisdiction pretaining to Circuit Courts, and in all such causes or proceedings, appeals shall lie from such trial courts directly to the Supreme Court, and the Supreme Court shall have exclusive jurisdiction of such writs of error and appeals, and shall in all such cases exclusively exercise superintending control over such trial courts."

"Sec. 6. **Courts of Appeals Cases may be Certified to Supreme Court, when.** — When any one of said courts of appeals shall in any cause or proceeding render a decision which any one of the judges therein sitting shall deem contrary to any previous decision of any one of said courts of appeals, or of the Supreme Court, the said Court of Appeals must, of its own motion, pending the same term, and not afterward, certify and transfer said cause or proceeding and the original transcript therein to the Supreme Court, and thereupon the Supreme Court must rehear and determine said cause or proceeding, as in case of jurisdiction obtained by ordinary appellate process; and the last previous rulings of the Supreme Court on any question of law or equity shall, in all cases, be controlling authority in said courts of appeals."

"Sec. 8. **Supreme Court — Superintending Control of.** — The Supreme Court shall have superintending control over the courts of appeals by mandamus, prohibition and *certiorari*."

State ex rel. Campbell *v.* St. Louis Court of Appeals, 97 Mo. 276–283;
M. K. & T. Ry. Co. *v.* Smith et al., 154 Mo 300.

This point is placed beyond controversy or dispute by the stipulation printed as Supplemental Record.

GEO. P. B. JACKSON,
For Plaintiff in Error.

ARGUMENT.

I.

The Kansas City Court of Appeals was the Highest Court in the State in Which a Judgment Could be had in this Case.

At the outset I desire to prevent any misapprehension as to the purpose of presenting or calling attention to the motion filed in the Kansas City Court of Appeals for a rehearing and to transfer the case to the Supreme Court of the State of Missouri, or to the prohibition proceedings in the Supreme Court, in the case of M. K. & T. R'y Co. *v.* Smith et al., 154 Mo. 300. Neither this motion in the Court of Appeals nor this prohibition proceeding in the Supreme Court is referred to or relied upon by the plaintiff in error as furnishing any ground or reason for the issuance of the writ of error in this case, or as establishing that a Federal question was so raised as to confer jurisdiction on this court for the purpose of reviewing the judgment of the highest court of the State in which judgment might be had in this case. It will probably be claimed here, as it was in opposition to the petition for the writ of error, that the case was not in a condition to entitle the plaintiff in error to have it reviewed in this Court. I think that probably the case of Johnson *v.* Risk, 137 U. S. 300, states the rule in as comprehensive and restrictive terms as we will find it anywhere, as follows: —

> "To give this Court jurisdiction to review a judgment of the State court, it must appear affirmatively not only that a Federal question was presented therein

for decision, to the highest court of the State having jurisdiction, but that its decision was necessary to the determination of the cause, and that it was actually decided, or that the judgment as rendered could not have been given without deciding it."

And, farther, I understand the rule to be that if there is another question upon which the decision might properly be based, this Court will not interfere, although there is a Federal question in the case, unless the judgment necessarily involves an adverse decision upon that Federal question, and still farther, that a writ of error will not issue to review a judgment of the State court on the ground of the presence of a Federal question, when such question is for the first time presented in a motion for rehearing. It is within the limits of these rules that the plaintiff in error presents the questions involved in this case, and therefore does not rely upon anything appearing in the motion for rehearing and to transfer to the Supreme Court, which was filed in and overruled by the Kansas City Court of Appeals, nor anything that appears in the prohibition proceeding in the Supreme Court of the State, which was decided adversely to this plaintiff in error, as establishing the presence of a Federal question in the case of Elliott *v.* M. K. & T. R'y Co., to review which the present writ of error is sued out.

The sole purpose of calling attention to these matters is to put the case in a proper position to justify the issuing of the writ of error from this Court to the Kansas City Court of Appeals, which is not ordinarily considered the Court of last resort in the State.

Our contention was that because of the presence of a Federal question in this case the jurisdiction of the appeal from the Cooper Circuit Court was in the Supreme Court

of the State instead of in the Kansas City Court of Appeals. Such is the provision of the Constitution of the State, and it was so held in M. K. & T. Ry. Co. *v.* Smith, 154 Mo. 300. Hence, if, without some explanation, an application had been made for a writ of error to the Kansas City Court of Appeals it would have been denied, for the reason that the case had not been determined by the court of last resort. Therefore, in order to bring the case within the ruling of this Court in the case of Bacon *v.* State of Texas, 163 U. S. 207, and similar cases, cited in Point III. of the Brief, I direct attention first to the motion in the Kansas City Court of Appeals. That was not only a motion for rehearing and to vacate the judgment previously entered in the Kansas City Court of Appeals, but also to transfer the case to the Supreme Court of the State, because of the presence of a Federal question, which motion was overruled. That is now referred to to show that the Kansas City Court of Appeals refused to surrender its jurisdiction over the case or to transfer it to the Supreme Court.

Then to show that plaintiff in error had exhausted all means for a review in the Supreme Court of the State, I have presented the necessary papers to show the application to the Supreme Court of the State for a writ of prohibition and certiorari against the judges of the Kansas City Court of Appeals, seeking to suspend any farther action by the latter Court in the case of Elliott against Ry. Co., and to cause the record in the same to be certified to the Supreme Court, on the ground that the case involved a Federal question (which could be done in the prohibition proceeding, State ex rel. *v.* St. Louis Court of Ap., 97 Mo. 276–283). In connection with this application I have also presented the evidence of the judgment of the Supreme Court, denying the relief thus sought, thus bringing the case within the decisions of

this Court to the effect that under such circumstances a writ of error would properly issue to the Kansas City Court of Appeals, if warranted by the other facts. In view of the stipulation that has been printed as supplemental record in this case, it will not be contended that there was anything else that this plaintiff in error might have done in order to secure a judgment from the Supreme Court of the State in the case of Elliott *v.* M. K. & T. R'y Co., and that therefore, under the circumstances, the Kansas City Court of Appeals was the highest court of the State of Missouri in which a judgment could be obtained in this case.

Having thus established the propriety of suing out a writ of error from this Court to the Kansas City Court of Appeals, no farther attention should be paid to the motion for rehearing and to transfer to the Supreme Court, filed in the Court of Appeals, nor to the prohibition proceeding in the Supreme Court.

II.

The question relied on as the Federal question, was presented to and decided by said Court adversely to the plaintiff in error, without which adverse decision the Court could not have rendered the judgment which it did.

The Federal question which the plaintiff in error insists was involved and adversely decided in this case, is that the extent of liability under or measure of damages recoverable upon the injunction bond sued upon is to be determined by the rule prevailing in the Federal court in which the bond was given; that the bond having been required by the United States Circuit Court of the Western District of Missouri in an equity suit, commenced and pending in that Court, the law governing that Court with reference to the

measure of liability upon such bond (which excludes attorneys' fees from the damages that may be recovered), entered into and became a part of the contract evidenced by the bond, and therefore an authority exercised under the United States was drawn in question. The consideration of this case involves a twofold question: first, whether there was or is a Federal question involved, and secondly, whether it was so presented as to call for the decision of the State court upon it.

Along with these questions there is another, about which there can be no dispute, and which may therefore as well be disposed of before considering the other propositions;— and that is, if there was a Federal question properly presented for decision, was the decision adverse to the plaintiff in error, and was it so essential to the judgment rendered as to justify a review of the case by this Court? The suit of Elliott against the Railway Company, in which this writ of error is prosecuted, was an action on an injunction bond to recover damages, almost the entire amount claimed being attorneys' fees for which Elliott claimed to have become responsible to his attorney. The plaintiff in error, as defendant in that case, contended that attorneys' fees could not be recovered on that bond. Both the trial and appellate courts in the State denied this contention, and held that attorneys' fees were recoverable, and awarded judgment for the entire amount sued for; therefore, the question was decided adversely to the plaintiff in error.

While it is true that there were other defenses made in the case, yet they were not of a character that avoided the decisive effect of the defense previously mentioned, — that attorney's fees were not recoverable upon that bond. These other defenses were that no damages having been adjudged against the principal in the bond, there could be

no recovery under the conditions of that bond; and, next, that as no step had been taken toward the assessment of damages at the same term of court at which the equity case was formally disposed of, as was required by the State practice, there could be no recovery; and, lastly, that there could be no recovery of attorneys' fees, because the injunction bond was a mere incident to a suit brought for another purpose.

While it is true that a ruling in favor of the defendant in that case (plaintiff in error here) would have been sufficient to defeat a recovery, yet it does not follow that a contrary ruling would have entitled the plaintiff to a judgment, regardless of the ruling upon the first defense that attorneys' fees are not recoverable on injunction bonds given in the United States courts. The defenses were independent of each other. Any one of them was a good and complete defense in itself, yet in order that the plaintiff might recover it was necessary that the Court should decide in his favor upon every one of those defenses. Even if the State courts had decided as they did, in favor of the plaintiff, upon the three defenses last mentioned, yet he was not then entitled to a recovery, because there still remained the other contention and defense that, notwithstanding the Court might hold that there could be a recovery upon this bond, although there had not been any previous adjudication of damages, and, notwithstanding the Court might hold that there could be a recovery although there had been no action taken to assess damages at the term at which the final decree was entered in the equity case, and, notwithstanding the Court might decide that damages could be recovered although the injunction was a mere incident to a suit instituted for another principal purpose, yet no judgment could have been given for damages on account of attorneys' fees paid, or liability therefor incurred, if the Court had also decided, as the defendant

in that case contended, that such attorneys' fees were not an element of damages, recoverable upon an injunction bond given in the United States court. In addition to the rulings favorable to the plaintiff upon the other defenses, it was also necessary that the Court should rule in his favor upon this last proposition and decide that attorneys' fees were recoverable on such bond; and therefore the decision which we have previously found was made adversely to the defendant, was necessary to the judgment actually rendered. Hence there can be no application in this case of the rule which denies jurisdiction to this Court, even though a Federal question may have been decided, if there were other questions decided in the case "broad enough to maintain the judgment independent of any Federal question." In the case of Elliott *v.* Ry. Co., there could have been no judgment in favor of the plaintiff, unless the Court had decided the Federal question adversely to the railroad company.

I think, therefore, we may now fairly say that the case clearly and distinctly presents the twofold proposition above suggested: —

1. Was there a Federal question in the case: and
2. Was it sufficiently presented in the State court?

III.

Was there and is there a Federal question in this case?

Our consideration of this branch of the case might be limited to the single question whether or not a suit upon an injunction bond given in a Federal court involves a Federal question for the purpose of determining the question of jurisdiction. Before proceeding to a more particular consideration of that question it is well to note some of the distinctions that have been made upon the question of juris-

diction. There is a marked distinction between the jurisdictional facts necessary in cases of removal from State to Federal courts, and in the jurisdiction of the Supreme Court of the United States to review the decisions of the highest court of a State. The ground for removal in the several acts of Congress is restricted in that respect to suits "arising under the Constitution and laws of the United States," whereas the power to review the judgments of the highest courts of the States may be exercised where an "authority exercised under the United States is drawn in question." The distinction was specially pointed out in the case of Carson *v.* Dunham, 121 U. S. 421. In that case the court was considering the jurisdiction of the United States Circuit Court as depending upon the removal from a State court, where the suit was not shown to be one "distinctly involving the laws of the United States," and in that case the court said: —

> "This suit therefore as now presented is not one arising under the Constitution and laws of the United States within the meaning of that term as used in the removal act of 1875; but if in deciding the case the highest court of the State shall fail to give full effect to the authority exercised under the United States as shown by the judgments and decrees of their courts relied upon to support the title of Mrs. Carson, its decision in that regard may be the subject of review by this court under section 709."

And again in the case of Provident Assn. *v.* Ford, 114 U. S. 635, it was held that a case could not be removed from a State to the Federal court simply because it was an action upon a judgment of a United States court. In the course of the opinion the court said that a judgment of the United States court as such was no

more than a security of record showing a debt due from one person to another. It was no more that if he had brought suit on a bond of the United States or had brought trover for the withholding of such securities. "It is simply the case of an ordinary right of property sought to be enforced. A suit on a judgment is nothing more unless some question is raised in the case (as might be raised in any of the cases specified) distinctly involving the laws of the United States, such a question for example as was ineffectually attempted to be raised by the defendant in this case. If such a question were raised, then it is conceded it would be a case arising under the laws of the United States." Keeping in mind the distinction between the grounds of removal and the grounds of jurisdiction to review the decisions of the highest tribunal of the State, it follows from the previous opinion that if a question is raised and insisted upon as involving authority under the United States, then clearly it would be a case where a writ of error would lie to the Supreme Court of the State. We must have regard to the cause of action sued on. It is true it is an injunction bond, but that is not the full measure of the contract. It is not from the words found in that bond alone that we are to ascertain the rights and liabilities of the respective parties. There is nothing there which says that any particular matter shall be an element of damages. We are to turn to something outside of that which the parties have written in the bond itself for guidance in that matter, and necessarily that must be to the law which controls in such a case. True the Court of Appeals in its opinion says, and it cites authority to the effect that in such case it is not the law which governs the Federal court where a bond is made that is to control, but the rule of law which is applied to similar bonds in the court where a bond may be sued upon that is to determine the extent of the liability originally

assumed by the making of the bond. The correctness of that position is now before this court. We are now seeking to determine whether or not the cause of action upon the injunction bond involves authority under the United States, or what is equivalent thereto, the duties, liabilities and immunities existing under the exercise of authority of the United States. It is not necessary to cite cases to establish the proposition that the law in force where a contract is made enters into and forms a part of that contract. Without entering into a discussion I submit that the following propositions are fully supported by reason and authority: that the law in force in the jurisdiction where the bond is made at the time it is made is to be considered as incorporated in it and as a part of the contract; that where there is no statute prescribing the conditions of the bond they are determined by the rules of court which take the place and have the effect of statutes, and that such a bond is a part of the record in the case, and in the court in which it is given, and therefore the law and the rules of practice in the Federal court entered into and became a part of the bond sued on in the case of Elliott *v.* Ry. Co.

Mix *v.* Vaile, 86 Ill. 40;
2 A. & E. Enc. of Law, 466;
Murfree on Official Bonds, Sec. 401;
Newell *v.* Partee, 10 Humph. (Tenn.) 325;
Pickett *v.* Boyd, 11 Lea (Tenn.), 498–503;
Nolan *v.* Johns, 27 M. A. 502;
Rubelman Hdw. Co. *v.* Greve, 18 M. A. 6;
Teasdale *v.* Jones, 40 M. A. 243;
Kinealy *v.* Stead, 55 M. A. 176–180.

It seems to be a self-evident proposition that if the law in force in the jurisdiction where the bond is given is a part of the contract, then necessarily that law and the practice and authority exercised under it are involved in any suit upon that contract.

An injunction bond is as much a part of the proceeding in a court as any other act that may be done in a case, and while the bond may be sued on in any other court, yet the rights and liabilities arising upon it ought to be determined from the terms of the bond itself with reference to the rules of law and practice governing the court by which the bond was required. It is settled by the authorities cited above that the law in force at the time an injunction bond is given is to be considered as incorporated in it, and as part of the contract. This is a general rule applicable to all contracts. And it is also settled that where there is no statute prescribing the conditions of a bond, they are to be determined by the rules of the court in which the bond is given or by the discretion of the chancellor. So much is the bond a part of the proceeding in the particular court that it is regarded as a part of the record in that case. In the case at bar the plaintiff sued upon a copy of the bond because the original was a part of the records of the Federal court at Jefferson City, where it still remains. The bond is so far governed by the statute or the rules of practice governing the court in which it is given that any conditions or obligations beyond those required by the statute are void, and will not be enforced. This was so held by the St. Louis Court of Appeals in Rubelman Hardware Co. *v.* Greve, 18 M. A. 6, and by Kansas City Court of Appeals in Nolan *v.* Johns, 27 M. A. 502. As there is no statute regulating injunction bonds in the Federal courts the rules and practice in those courts take the place of the statute, and everyone giving a bond of that character in the United States court is to be considered as having made the bond with reference to the liabilities and subject to the conditions established and recognized by such rules and practice. The promulgated rules and the rules of law established by the decided cases in those courts must be understood to be incorporated in and to become a part of the contract evidenced

by the bond, and therefore the obligation of the maker of the bond or the right to recover by the defendant in the injunction suit is to be determined by the measure of liability or right created and recognized by the rules and decisions of the Federal courts, and not by the statute of a State designed to regulate similar bonds given in the State courts.

The Kansas City Court of Appeals, itself, conceded the proposition we are contending for, in the opinion in this case, of which we complain because of the inconsistency of the court in afterwards repudiating, as unsound, the very principle which it invoked as an answer to another contention made in that court. It was claimed by the appellant (plaintiff in error here) that either the law of the United States courts or the law of the State of Missouri should govern in its entirety; and if the Kansas City Court of Appeals should deny the position contended for by the appellant there, namely, that under the law as applied by the United States court, where the bond was given, attorneys' fees could not be considered an element of damage on the bond, but that on the contrary, the law of the State which allowed such fees would control, then the law of the State in another particular should also control, to wit: that in order to entitle a party to recover upon an injunction bond, there must be an assessment of damages at the term at which the injunction is dissolved This alternative proposition was submitted in point IV of the brief filed in the Court of Appeals (Record, p. 43). In disposing of that the Court of Appeals, in its opinion (Record, p. 66), says: "Defendant's first (?) contention is based largely on a line of cases decided by our Supreme Court, among which is Dorriss *v.* Carter, 67 Mo. 554, holding that in a suit on a statutory injunction bond no action for damages can be sustained until such damages have been assessed by the court dissolving the injunction. In our

opinion, these cases have no application here, since they are based on the provisions of our injunction statute, *which cannot be used to control equity proceedings in the Federal Courts.*"

I suppose it will not be disputed that if the measure of liability on this bond is to be ascertained by the rules and the law governing the court in which the bond was given, then the plaintiff should not have recovered and the judgment should be reversed. In the first place, it will be noticed that the principal amount of damage claimed was on account of attorneys' fees, whereas in the Federal courts attorneys' fees are not considered an element of damages on an injunction bond. Since that is the law of Federal courts, and since the law of that court enters into and forms a part of the contract of a bond given in such court, it necessarily follows that any condition in that bond for the payment of damages did not contemplate the payment of attorneys fees which by the law of that court was not considered an element of damage at all. If there is any meaning in the authorities cited, then there is no logical theory upon which to say that this defendant or its sureties entered into the contract embodied in the bond intending or expecting that it in any manner obligated them to pay as damages something which the very court, in response to whose order the bond was given, declared was not an element of damages in such case. Upon what theory then can it be said that, when the law and the rules of practice in the Federal court provide for the taxation of certain attorneys fees to be paid as costs in the case, and repudiate the right of anyone to consider attorneys fees as an element of damages on an injunction bond, the makers of such bond obligated themselves to pay the attorneys fees as damages upon the bond, or that a bond made under such circumstances would give the obligee the right to go into some other court and recover as damages those attorneys fees in

violation of the law which entered into and became a part of this contract at the time the bond was made. On the trial below the plaintiff relied upon the case of Wash *v.* Lackland, 8 M. A. 122, as authority for including attorneys fees in such case. It is undoubtedly the fact that in that case the St. Louis Court of Appeals did decide that although the bond there sued on was given in a Federal court, there could be a recovery of attorneys fees as damages in accordance with the practice prevailing as to bonds given in Missouri, but I submit that an examination of that case will disclose a lack of any satisfactory reasoning leading to that conclusion. The court wholly ignored the nature of the obligation of an injunction bond: that it was a part of a proceeding in the particular court in which it was given; that the law governing the court in which it was given is to be considered as incorporated in and as a part of the bond, etc.

The unsoundness of the reasoning of that case will be disclosed by a consideration of the following clause: —

> "There was no stipulation in the bond that it should be sued on in a Federal court. While it is but natural and proper to suppose that the Federal tribunals would adhere to their former rulings, there is yet no guaranty to that effect in the contract. We therefore fail to perceive that the makers intended to create only such obligations as attach under the Federal jurisprudence. The interpretation of a contract belongs to the court before which it is pending."

In the first place, it is wholly immaterial in what court the bond may be sued on, yet this seems to be made a decisive question by the St. Louis Court of Appeals in the above opinion. The real question is where was the bond made? The significance of any stipulations in a bond

is determined by the circumstances surrounding the making of it, and not those present at the time of suing upon it. For instance, in the case of Pickett *v.* Boyd, 11 Lea (Tenn.), 498–503, an injunction bond given in the State of Arkansas was sued on in the State of Tennessee, and the court of the latter State held that the Arkansas statute would control, although the court said that the statute really only affected the remedy; and again in the case of Mix *v.* Vail, 86 Ill. 40, and in Murfree on Official Bonds, Sec. 389, it is held that injunction bonds cannot be affecetd by laws passed subsequent to their execution. This seems to be too elementary to require further citation of authorities, and since this and other courts have decided that in effect the rules of practice in equity have an equivalent force to statutes governing the practice in such cases, and since as to such questions the relation of the Federal and State courts is similar to that existing between the courts of different States, the only logical conclusion is that the laws and rules of practice in force at the time in the jurisdiction when and where the bond was given are the essential things which are to control, and not the fact that the bond may be sued on in one court or another, and therefore the language already quoted from the St. Louis Court of Appeals shows a disregard of the real principles, and that the matters which the court there suggested as reasons for its conclusion were wholly insufficient. In other words, it is immaterial whether there was a stipulation that the bond should be sued on in a Federal court or not, because not the place where the suit was brought, but the law of the place where the bond was made measured the liability. Nor is it material whether there was any subsequent change in the rulings of the Federal court or for that matter any change in the statutes of the State, because it is not any subsequent changes of the law, whether it rest in statute or in decision, that are to control, but the rule of law existing at the time

the bond was made. The St. Louis Court of Appeals said that the interpretation of the contract belongs to the court before which it is pending. Undoubtedly that is true, but it is very evident that the court in that case made a serious mistake in undertaking to interpret the contract as though it had been made in a State court instead of a Federal court. While the court where the suit was brought must interpret the contract, yet it must interpret it according to established rules, one of the fundamental ones being that a contract is to be governed by the law of the place where it is entered into. As already stated, there is as much distinction between the jurisdiction of a Federal and a State court as there is between the courts of two States. The contract should have been interpreted, therefore, according to the circumstances as governed by the law of the Federal court where the bond was made, and not according to the law of the State court where it was sued upon, which under no circumstances could have entered into the minds of the parties at the time the contract was made. It would be equally logical with anything suggested by the St. Louis Court of Appeals if we should now inquire: Was there any stipulation or assurance that this bond would be sued upon in the State court, so that it might be interpreted as the court did interpret it? It will be seen at once that the reasoning of that court resolves the case into a contract which has a variable signification. If it is sued upon in a Federal court, it is interpreted as though the parties expressly stipulated that they would not pay any attorneys' fees by way of damages, while if the same bond is sued upon in a State court it is to be interpreted as meaning that the parties expressly stipulated that they would pay such attorneys' fees by way of damages. Courts may differ in construing the same contract, but the parties mean only one thing, and one court or the other makes a mistake if they do not agree as to what the

contract means. It is manifest that a decision is erroneous which intentionally and necessarily puts a contract in the position of being susceptible of one meaning in one court and of a different meaning in another court. The mistake that the St. Louis Court of Appeals made in that case was that it disregarded a fundamental law of contracts. It disregarded the intention of the parties. It disregarded the law governing contracts at the place where that bond was made, and, by subsequently injecting other conditions and different rules of law into the contract at the time the suit was brought upon it, it reached a wrong conclusion. The decision seems to rest not so much in the reasoning of the court itself, as in this statement: —

> "It is settled in Missouri that attorneys' fees paid in defense of an injunction suit may be recovered as damages in an action on the injunction bond, and this although the bond was given and the injunction obtained in a Federal court."

And then follows the citation of several cases to which we ask the attention of the court in order to show that they absolutely furnish no authority for the statement made by the St. Louis Court of Appeals. Only one of them, R. R. *v.* Shepley, 1 M. A. 254, at all touches upon the question. In that case the decision was based upon the statement that "a bond of this kind is to be governed by the rules that govern the interpretation of any other contract. If the obligor when executing it, knew that under a ruling of the Supreme Court of the United States, he could not be held by this obligation to pay counsel fees, he also knew that by the interpretation put by the Supreme Court of the State of Missouri upon the same obligation in a similar proceeding he would be held for counsel fees in case of failure to maintain his injunction."

This, as it will be seen, ignores the occasion of the making of an injunction bond and all the rules of law entering into the same. What has been said in regard to the former case may be repeated here, and nothing is added to the logic of these cases by citing the one in support of the other.

As to the other cases cited in Wash *v.* Lackland, it is only necessary to make the following reference to them: —

State ex rel. *v.* Beldsmeier, 56 Mo. 226, was an action on an attachment bond and only held that a party might sue on the bond without having filed a plea in abatement.

Barnes *v.* Webster, 16 Mo. 258, was a suit on a bond given in an attachment suit, conditioned to pay all damages that might accrue, — held suit could be maintained to use of a garnishee, and though the bond was not authorized by any statute it was good as a common law bond, and though made to the United States instead of defendant, he could maintain suit by United States to his use.

Leisse *v.* R. R., 2 M. A. 105, does not in any manner involve any question concerning an injunction or a bond given in a Federal court. It was an action to recover damages for the institution of proceedings to condemn private property, and it was held not necessary to have actually paid out money for expenses incurred.

The defendant in error here, as respondent in the Kansas City Court of Appeals, also cited in his brief, and the Court of Appeals in its opinion relied upon the following cases: —

Mitchell *v.* Hawley, 79 California, 301;
Aiken *v.* Leathers, 40 La. An. 23.

Concerning the above case from California it may be said that it is subject to the same criticism as the case of Walsh *v.* Lackland, 8 M. A. 122. It wholly ignores the

proposition that the law governing in the jurisdiction in which a contract is made is supposed to enter into and become a part of it, and makes the construction of a contract depend upon the law in force in the jurisdiction where it may be sued upon, thus giving to the contract and to the intention of the parties in making it a variable meaning and effect, according to the place where suit may be brought upon it. It will farther be noted of this case that the statement of the view of the court is not very positive, being as follows: "We cannot agree with counsel in the view that in an action brought in a court in this State on an injunction bond given in a court of the United States, counsel fees can in no instance be recovered as damages, because such damages are not allowed by the Federal courts," while at the same time the court refused to allow attorneys' fees in that case, and remanded the case with instructions to the lower court to modify its judgment by striking out the amount awarded as attorneys' fees; in all other respects the judgment was affirmed.

The case of Aiken v. Leathers, from Louisiana, did not in fact undertake to decide that the rule governing the measure of damages in the Federal courts should not control, but upon a misconception of what this court decided in the case of Meyers *v.* Block, 120 U. S. 206, assumed that there had been a modification of the rule concerning the recovery of attorneys' fees on injunction bonds given in the United States courts, or at least that there was a conflict in the decisions of this court upon that subject, and then held that in view of that circumstance it would permit a recovery of attorneys' fees under such circumstances, at the same time admitting that there might be error in such judgment, which will be a point to be noticed later on in our reference to cases affirmatively establishing the presence of a Federal question, where the question of attorneys' fees is involved.

In the series of cases decided in this court, known as the "Removal Cases," and reported in 115 U. S. 1, this court held that cases against corporations created by the laws of the United States arose under such laws so as to authorize a removal to the Federal courts.

That decision was based largely upon the ruling of this court in the case of Osborn *v.* Bank of United States, 9 Wheat. 817, in the course of which opinion Chief Justice Marshall remarked: —

> "When that bank sues, the first question which presents itself, and which lies at the foundation of the case, is, has this legal entity a right to sue? Has it a right to come not into this court particularly, but into any court? This depends upon a law of the United States. The next question is: Has this being a right to make this particular contract? If this question be decided in the negative, the cause is determined against the plaintiff; and this question depends entirely on a law of the United States. These are important questions, and they exist in every possible case. The question forms an original ingredient in every case. Whether it in fact be relied on or not in the defense it is still a part of the cause, and may be relied on. The questions which the case involves then must determine its character, whether those questions be made in the cause or not."

Applying this language to the case at bar we may say that when suit is brought upon the injunction bond the question which lies at the foundation of the cause, is, By what authority was this bond given? And that is a question that depends upon the power and the authority and rules of practice of the United States court. The next question is, what is the extent of liability, and what is the measure

of damage upon the contract evidenced by this bond? And that, too, is a question which depends upon the law and the rules of practice governing the United States court.

It has been decided that a suit upon the official bond of the cashier of a national bank involves a Federal question.

Walker *v.* Bank, 56 Fed. 76.

It has also been decided that an action against a marshal for goods seized by him under attachment from a United States court is one arising under the authority of the United States.

Bock *v.* Perkins, 139 U. S. 628;
Feibelman *v.* Packard, 109 U. S. 421.

And where a defendant in trespass justifies under authority of a court of the United States there is a Federal question involved.

Houser *v.* Clayton, 3 Woods, 273.

A suit to set aside a sale made under a decree of a Federal court involves an authority under the United States and presents a Federal question.

Johnson *v.* Banking Assn., 33 La. Ann. 479.

In Crescent Live Stock Co. *v.* Butchers Union, 120 U. S. 141–146, it was held that the question whether a State court has given due effect to the judgment of a court of the United States is a question arising under the Constitution and laws of the United States, and comes within the jurisdiction of the Federal courts by proper process. This was said in a case upon writ of error to the Supreme Court of the State of Louisiana.

In the case at bar, the practical question is: Has the

State court given due effect to the order of the United States court in requiring and approving the injunction bond given in the suit in equity pending in that court? Without farther specifying, the following cases may be cited as authority upon the proposition that the case at bar involved a Federal question: —

Wood *v.* Drake, 70 Fed. 881;
Johnson *v.* Christian, 125 U. S. 642;
Lacassagne *v.* Chapuis, 144 U. S. 119;
R. R. *v.* Briscoe, 144 U. S. 133;
R. R. *v.* Amato, 144 U. S. 465;
R. R. *v.* Cox, 145 U. S. 593;
Carey *v.* R. R., 161 U. S. 115;
R. R. *v.* Haber, 169 U. S. 613–622.

This last case bears especially upon the point that when the contention is made that a Federal or constitutional question is presented, and the ruling upon that would be decisive of the case one way or the other, then such question is so involved in the case as to require its consideration, and as to confer jurisdiction upon the courts which are authorized to pass upon such questions.

The above cases are more or less general in their character and application to the question under consideration. We fortunately are not without cases bearing directly upon the particular question of injunction bonds to serve as a guide in determining the question now before us.

We have a specific and positive statement of the law applicable to such cases from Chief Justice Taney in the case of Bein *v.* Heath, 12 How. 168, in which he said, among other things: —

> "*Now, there is manifest error in subjecting the parties to an injunction bond given in a proceeding in a court of the United States to the laws of the State.*

The proceeding in the Circuit Court of the United States in equity is regulated by the laws of Congress and the rules of this court made under authority of an act of Congress. And the 90th rule declares that when not otherwise directed the practice of the High Court of Chancery in England shall be followed. The 8th rule authorizes the Circuit Courts, both judges concurring, to modify the process and practice in their respective districts. But this applies only to forms of proceeding and mode of practice, and certainly would not authorize the adoption of the Louisiana law defining the rights and obligations of parties to an injunction bond nor do we suppose any such rule has been adopted by the court, and if it has it is unauthorized by law, and cannot regulate the rights or obligations of the parties. * * * And when an injunction is applied for in the Circuit Court of the United States sitting in Louisiana, the court grant it or not, according to the established principles of equity, and not according to the laws and practice of the State in which there is no court of chancery, as contra-distinguished from a court of common law. And they require a bond or not, from the complainant, with sureties, before the injunction issues, as the court, in the exercise of a sound discretion, may deem it proper for the purposes of justice. And if, in the judgment of the court, the principles of equity require that a bond should be given, it prescribes the penalty and the condition also. And the condition prescribed by the court in this case, but which was not followed, is the one usually directed by the court. *In such proceeding upon such a bond the court would have no authority to apply to it the legislative provisions of the State.* The obligors would be answerable for any damages or costs which the adverse party sustained by reason of the injunction from

> the time it was issued until it was dissolved, but to nothing more. They would certainly not be liable for any aggravated interest on the debt, not for the debt itself unless it was lost by the delay, *nor for the fees paid to the counsel for conducting the suit.*"

There never has been any question of that statement of the law at any time nor in any case, and it is a direct authority that the case at bar involves a Federal question.

The Court of Appeals, in order to fortify its position, which was contrary to the rule as announced by Chief Justice Taney, cited certain cases as authority upon the proposition that the measure of liability upon an injunction bond given in a Federal court would be different if the bond was sued upon in a State court from what it would be if sued upon in a Federal court. Waiving any farther discussion of a proposition which seems to bear in its statement its own refutation, when it asserts that the same contract means one thing in one court and another thing in another court, it is only necessary to turn to the very cases cited by the Court of Appeals to establish the proposition we are now contending for, namely, that the case involved a Federal question, and therefore the judgment of the Kansas City Court of Appeals must be reversed. Regardless of any criticisms that may be made upon the reasoning of these cases; regardless of the fact that, notwithstanding what the Court of Appeals quotes from the California case, still that court refused to allow the attorney's fees as an element of damages, I ask this court to note that in the case of Aiken *v.* Leathers, 40 La. Ann. 23, cited by the Court of Appeals, the court did not attempt to hold that the rule of liability in the Federal courts should not control, but on the contrary attempted to show the fallacy of this court in its decision in the case of Oelrichs *v.* Spain, 15 Wall. 211, and then the Louisiana court sought

to apply to the case what it conceived was the rule which the Federal courts *ought* to adopt as the measure of damages, at the same time ignoring the fact that in Bein *v.* Heath, *supra*, and in Myers *v.* Block, 120 U. S. 206, this court had asserted that attorneys' fees were not a proper element of damages. The argument made by the Louisiana court necessarily asserted the proposition which we now contend for, that is that a suit upon an injunction bond given in the Federal court involved a Federal question, and involved an authority under the United States, and the court in terms stated this view, because, after having stated its conclusions, and having condemned the views of this court, in Oelrichs *v.* Spain the Louisiana court said: —

> "We feel relieved from judicial responsibility for any error of judgment which we may commit in reaching this conclusion by the thought that it lies within the power of defendants to obtain a correction of such error at the hands of the exalted tribunal whose decision on the point would be our guide for the future."

That means that this court could review the decision then being made, by a writ of error, while every one knows that a writ of error would not lie from this court to the Supreme Court of Louisiana unless either the Constitution or some law of, or some authority under the United States was involved.

But, again, the case principally relied upon by the Court of Appeals in its decision, and as the means by which it evaded the force of the decision of Chief Justice Taney above mentioned, is the case of Myers *v.* Block, 120 U. S. 206. That case unquestionably did undertake to distinguish the case of Bein *v.* Heath in one particular, and in that particular reached a different conclusion, upon the

question of the right to recover upon an injunction bond without a previous adjudication of the damages, but with that we are not concerned at this time. That case in no manner modified the decision of the court in Bein *v.* Heath, upon the question that the law of the Federal court, and not the law of the State measured the liability upon an injunction bond given in a United States court. Myers *v.* Block was before this court on a writ of error to the Supreme Court of the State of Louisiana. All we can learn from the report of that case is that there was an ordinary action at law in a State court on an injunction bond given in a United States court.

The point to which I now invite attention in this case of Myers *v.* Block, is that it is an authority supporting the proposition that a suit upon an injunction bond given in a Federal court involves a Federal question so as to give this court jurisdiction over the case by writ of error to the Supreme Court of the State. The question is not discussed at length. It seems to be assumed as too plain to require argument, but that it is fairly and specifically in the case, and that the jurisdiction of this court in that case depended upon that question alone, and that, unless the view of the court was as we now contend, it could not have had jurisdiction at all, is apparent from an examination of the case. In the preliminary statement on page 206 is this sentence: "The facts which make the Federal question are stated in the opinion of the court." In the opinion of the court we find on page 209 a statement of the errors assigned, consisting of four points, the first being: "The Supreme Court of Louisiana erred in subjecting the plaintiffs in error to the law and jurisprudence of Louisiana when they were parties to an injunction bond given in equity and in and by order of the Federal court." The other three points have no possible bearing upon the question of jurisdiction. It does not appear that there was any

controversy over the question of jurisdiction, but the only ground upon which the court could have retained jurisdiction of that case was that it involved a Federal question, and the only Federal question was that suggested by the first assignment of error, which involves the proposition contended for in the case at bar, namely, that the obligors in an injunction bond given in an equity suit in a United States court have a right to claim an immunity against a liability for attorneys fees by reason of the rules of practice and the law governing in proceedings in Federal courts, and that the authority of the United States exercised by the Federal courts is drawn in question in any suit upon a bond given in pursuance of an order and under the direction of a Federal court. Upon this state of case the court proceeded to review the decision of the Supreme Court of Louisiana, which it sustained, but manifestly, unless it had jurisdiction over the case, it would not have considered that opinion at all. It would have dismissed the writ of error, and therefore I say that it is a direct authority to sustain our contention as to the character of the case, and consequently determining the question of jurisdiction of this court on the theory of a Federal question being *necessarily* involved in an action on an injunction given in a case in a Circuit Court of the United States.

The question has been very directly passed upon by the United States Circuit Court of Appeals for the Sixth Circuit in the case of Le[illegible] Brown, 90 Fed. 171. There an action at law was brought in the United States Circuit Court for the District of Kentucky without any claim of diverse citizenship between the parties, the jurisdiction being grounded upon the proposition that the suit was to recover damages upon an injunction bond previously given in a Federal court. The jurisdiction of the court having been questioned, Judge Taft, in disposing of the case, said: "We have no doubt that an action at law in a Federa

court may be brought on such a bond, provided the necessary amount is involved, on the ground that the plaintiff is enforcing rights secured to him under the Constitution and laws of the United States." When a suit is brought in a State court, whether the amount be more or less than necessary to confer jurisdiction upon a Federal court, certainly the plaintiff must be enforcing rights secured to him under the Constitution and laws of the United States, and with equal truth may it be said that the defendant who seeks to limit his liability to the measure of damages recognized and allowed by the Federal court, under whose order and approval the bond was given, is enforcing and invoking rights, privileges and immunities arising under the laws of the United States, and draws in question authority exercised under the United States.

The cases already cited clearly establish that an authority under the United States was drawn in question in this case; that an action on the bond here sued on necessarily involves the law of the United States as declared by her courts concerning the measure of liability on an injunction bond given in a proceeding in such court, and that a defense that attorneys fees cannot be recovered on such bond invokes a right and an immunity under the law and authority of the United States, and that brings us to the next proposition.

IV.

Was the claim of a right or an immunity under the Federal law presented in such manner or was an authority under the United States so drawn in question, as to justify the issuing of a writ of error to the Kansas City Court of Appeals?

Referring again to the proceedings in the Circuit Court of Cooper County: If these pleadings and these instructions do not present the claim of a right or immunity under

the law governing the practice in the Federal courts, and do not claim the right to restrict the liability upon the injunction bond given in the United States court, in accordance with the rules of law and practice governing such courts, then I say candidly such question was not raised in the Circuit Court. In that connection, I want to say, however, that under the State practice permitting pleading by general denial, and raising defenses thereunder consisting of any specific matter which tends to defeat the right of recovery, it was not necessary, and not to be expected, that the defendant in that case would specially plead the rule of liability applicable to bonds given in Federal courts and specifically denominate it as a Federal right or a defense under a Federal immunity. It would have been denounced as bad pleading if it had been done. In the same way, under declarations I and II, asked by the defendant in that case, it may be said that the practice in the State justifies the presenting, in these general instructions or declarations, any proposition of law which overcomes the plaintiff's case and destroys his right of recovery, and therefore it was not necessary, and not to be expected, that the defendant, in asking the declarations of law would have specifically mentioned the different propositions relied upon. Perhaps we are unfortunate that the practice in the State is as it is. That these pleadings and these instructions were regarded as sufficient to raise the specific question of the right to defeat a recovery for attorneys fees upon this bond, because the law governing the Federal courts is that no such damages can be recovered, is beyond question, for it was argued at length upon both sides in the Circuit Court upon substantially the same authorities that were afterwards presented in the Court of Appeals. But it is not necessary that the Federal question or the Federal right should have been so specifically asserted and claimed in the

trial court. It is sufficient if it is clearly asserted and distinctly claimed when the case is first presented to the appellate court. This necessarily follows from those cases which decide that this court will not review the judgment of a State court when the Federal question is first presented in a motion for rehearing. That necessarily means that it is sufficient if the Federal question is presented on the original hearing of the case in the appellate court; otherwise the ruling would be that the judgment will not be reviewed unless the question was presented with the particularity required in the lower court. I do not mean by this statement to admit that the Federal question and the Federal right were not sufficiently presented in the lower court, but we may consider that in connection with the assertion of the claim in the Court of Appeals. Recurring now to the points and authorities, and the argument in support of the same, as set forth in the accompanying printed brief, which, together with the opinion of the court is the only means we have of ascertaining what questions were presented to the Court of Appeals for its decision, I submit that there ought to be no question but that the present plaintiff in error, the railway company, invoked as a defense in that case the rule of liability arising out of the law governing the Federal courts and also invoked the immunity from liability for attorneys fees, because in exercising the authority of the United States the Federal courts exclude attorneys fees from the damages that may be recovered upon injunction bonds required by and given in such courts. Note, if your Honors please, Points I, II and III of appellant's brief in the Court of Appeals (Record, pp. 42 and 43), to the following effect: —

First, the right of recovery depends entirely upon the bond.

Second, the law in force at the time the bond is made, at the place and in the court where it is given, is to be con-

sidered as incorporated in and as a part of the contract evidenced by the bond; that where there is no statute prescribing the conditions of the bond they are determined by the rules of court and the discretion of the chancellor before whom it is given, and the bond is a part of the record in the case and of the court in which it is given, and therefore the rules and practice in the Federal court entered into and became a part of the bond sued on in this case, and

Third, the terms and conditions of the bond sued on must be construed under and determined by either the rules and practice of the Federal courts or by the statute and decisions of Missouri, and on either theory the lower court had erred in rendering judgment for the plaintiff, since viewed as a bond subject to the rules and practice of the Federal courts the judgment was erroneous, because the principal damage allowed was attorneys fees, which are not considered an element of damages on an injunction bond in a Federal court.

There were other questions in the case, namely, that no damages had been adjudged upon the dissolution of the injunction, and therefore under the terms of the bond there could be no recovery until damages had been adjudged, and farther, that in any event whether the case was to be governed by the Federal law or the State law, there should be no recovery of attorneys fees, because the injunction in this case was a mere incident to other purposes which were the principal ones in the case. It is manifest, however, that these other defenses cannot destroy the right to a review upon the Federal question suggested. No matter how the court might rule upon the question of the necessity of a previous assessment of damages; no matter how it might rule upon the question of the injunction being a mere incident to some other as the principal purpose of the equity suit, still the limit of liability imposed by the law

governing Federal courts which excludes attorneys fees as an element of damages would supersede these other questions and preclude a recovery. Therefore the question of the effect of the Federal law upon the right of recovery was such as to destroy it, regardless of the ruling upon any other question, and when the court decided adversely to the contention of the defendant it necessarily decided against a right and an immunity claimed under the Federal law, and decided that question in such a way that the vice of its decision could not have been overcome by its ruling upon any other question that was presented in the case.

Before considering farther just what was done in the case at bar, it may be well to notice the decisions of this court concerning what is a sufficient assertion of a Federal right or question.

In C. B. & Q. R. R. *v.* Chicago, 166 U. S. 226, which was in error to the Supreme Court of Illinois, there was a motion to dismiss for want of jurisdiction, which was overruled, and the jurisdiction of the court sustained. That was a condemnation proceeding, and there was no answer setting up any defense or asserting any right or immunity. The point was made in the motion for new trial that the rulings of the court in excluding evidence were contrary to the Fourteenth Amendment of the Federal Constitution, and in the assignment of errors filed in the Supreme Court of Illinois the same complaint was made.

In disposing of that case the court said: —

> "It is not, therefore, important that the defendant neither filed nor offered to file an answer specially setting up or claiming a right under the Constitution of the United States. It is sufficient if it appears from the record that such right was set up or specially claimed in the State court in such manner as to bring it to the attention of that court."

And farther: —

"It is true that the Supreme Court of Illinois did not in its opinion expressly refer to the Constitution of the United States, but that circumstance is not conclusive against the jurisdiction of this court to re-examine the final judgment of the State court. The judgment of affirmance necessarily denied the Federal rights thus specially set up by the defendant, for that judgment could not have been rendered without deciding adversely to such claims of right. Those claims went to the very foundation of the whole proceeding so far as it related to the railroad company, and the legal effect of the judgment of the Supreme Court of the State was to deny them. 'The true and rational rule,' this court said in Proprietors, etc. *v.* Land & Imp. Co., 68 U. S., 1 Wall. 116–143, 'is that the court must be able to see clearly from the whole record that a certain provision of the Constitution or act of Congress was relied on by the party who brings the writ of error, and that the right thus claimed by him was denied.' In Roby *v.* Colehauer, 146 U. S. 153–159, it was said that 'our jurisdiction being invoked upon the ground that a right or immunity specially set up and claimed under the Constitution or authority of the United States has been denied by the judgment sought to be reviewed. It must appear from the record of the case either that the right so set up and claimed was expressly denied or that such was the necessary effect in law of the judgment.' DeSaussure *v.* Gaillard, 127 U. S. 216–234; Brown *v.* Atwell, 92 U. S. 327; Insurance Co. *v.* Needles, 113 U. S. 574–677; Sayward *v.* Denny, 158 U. S. 180–183. There is, we conceive, no room to doubt that the legal effect of the judgment

below was to declare that the rights asserted by the defendant under the national Constitution were not infringed by the proceedings in the case, consequently the motion to dismiss for want of jurisdiction must be overruled, and we proceed to examine the case upon its merits."

In Oxley Stave Co. *v.* Butler County, in error to the Supreme Court of Missouri, the writ of error was dismissed, but the court stated the correct rule as follows:—

"This court may re-examine the final judgment of the highest court of a State when the validity of a treaty or a statute of or authority exercised under the United States is 'drawn in question,' and the decision is against its validity, or when the validity of a statute or an authority exercised under any statute is 'drawn in question' on the ground of repugnancy to the constitution, treaties or laws of the United States, and the decision is in favor of its validity. But it cannot review such final judgment even if it denied some title, right, privilege or immunity of the unsuccessful party unless it appear from the record that such title, right, privilege or immunity was 'specially set up or claimed' in the State court as belonging to such party under the Constitution, or some treaty, statute, commission or authority of the United States. Looking into the record, we do not find that any reference was made in the court of original jurisdiction to the Constitution of the United States, nor can it be inferred from the opinion of the Supreme Court of Missouri that that court was informed of the contention of the parties that any Federal right, privilege, or immunity was intended to be asserted. For aught that appears, the State court proceeded in its determi-

nation of the cause without any thought that it was expected to decide a Federal question. The Supreme Court of Missouri properly said that only two questions were presented by the record for its determination." (Then follows a statement of the questions submitted for decision, clearly showing that there was no assertion of any right or immunity under the Constitution or law, or any authority of the United States.)

The court then proceeded to consider the meaning of the words "specially set up or claimed," with the result that it stated that "specially" as there used means "unmistakably," and that the statutory requirement is not met if the declaration is so general in its character that the purpose of the party to assert a Federal right is left to mere inference. The alternative expression "set up or claimed" would indicate that the right might be asserted by some special pleading, or by claiming it by unmistakably urging it upon the court as a ground for relief by way of defense or otherwise. It should be noted that in the Oxley case the only claim of the presence of a Federal question was based upon the fact that the decree complained of was passed against deceased persons, from which it was argued that it was in violation of the Fourteenth Amendment to the Constitution of the United States, although there was no reference to the Constitution at any stage of the proceeding in the State court.

After examining various authorities, the court concluded the opinion as follows: —

"Without further references to adjudged cases, we are of the opinion that the general allegation or claim, in different forms, that the decree of the Butler County Circuit Court was passed against some persons who

were at the time dead and against others who were necessary parties, but who had no notice of the proceedings, does not, within the meaning of U. S. Rev. Stat., Sec. 709, specially set up a right or immunity under the Fourteenth Amendment of the Constitution of the United States forbidding a State to deprive any person of his property without due process of law. *If it appeared that the Supreme Court of the State regarded these general allegations as asserting such Federal right or immunity and denied the claim so asserted, our jurisdiction could be sustained, but it does not so appear.*"

While the Oxley case is in strict harmony with the other decisions of this court, it perhaps states the rule as clearly and as strongly against the jurisdiction as any other case, and yet I feel confident that upon the authority of that case this court ought to entertain jurisdiction in the case at bar.

I repeat the quotation formerly made from the case of R. R. *v.* Haber, 169 U. S. 613, as follows: —

"The *answer* of the railway company as well as its *requests for instructions*, and the *opinion of the Supreme Court* of the State, show that the company contended throughout this litigation that legislation by Congress and the regulations prescribed by the Secretary of Agriculture in execution of the animal industry act, furnished a complete defense to all claims for damages asserted in this action. That contention was overruled by the trial court, as well as by the Supreme Court of the State. If the contention of the railway company had been sustained, the verdict and judgment must have been in its favor without reference to any other question in the case. In other

words, the State court could not properly have disposed of the case without deciding the Federal question raised by the company. This court, therefore, has jurisdiction to inquire whether the Supreme Court of Kansas erred in holding that the legislation of Congress and the regulations of the Secretary of the Interior gave to the railway company the right, privilege, and immunity specially set up and claimed by it. The motion to dismiss for want of jurisdiction in this court is consequently overruled."

As was there suggested, that case also involved a statute of the State of Kansas. At the same time it will be noticed from the above extract that the court there treated the Federal question as depending upon the immunity or the right invoked under a law of Congress, and certain regulations prescribed by the Secretary of Agriculture as furnishing a complete defense to the claim for damages asserted in the action against the railroad company. As I understand the case, the jurisdiction was not sustained because of the peculiar form in which the defense may have been alleged in the answer, as specially invoking the immunity or right referred to, but because it was apparent upon the whole record that if the contention of the railway company had been sustained the verdict and judgment must have been in its favor, and that the State court could not properly have disposed of the case without deciding the Federal question raised by the company, and the jurisdiction was sustained, although the court afterwards held that the State court had properly decided upon the defense claimed by the railway company.

In the case of Kipley *v.* Illinois, ex rel., 170 U. S. 182, which was in error to the Supreme Court of Illinois, the writ was on motion dismissed, because a Federal question

was not properly presented. The ground upon which the claim was made was an allegation in the answer to the effect that a certain statute of Illinois was unconstitutional and void, and this the court held must be taken as intended to apply to the Constitution of the State, and not to the Constitution of the United States.

In disposing of the case the court said: —

> "The answer makes no reference whatever to the Constitution or the laws of the United States. It is true that it avers that the Illinois Civil Service Act was unconstitutional and void (that is, as elsewhere suggested, under the State Constitution) but when the jurisdiction of this court is invoked for the protection against the final judgment of the highest court of a State, of some title, right, privilege or immunity secured by the Constitution or laws of the United States, it must appear expressly or by necessary intendment from the record that such right, title, privilege or immunity was specially set up or claimed under such Constitution or laws. Our jurisdiction cannot arise in such case from inference, but only from averments so distinct and positive as to place it beyond question that the party bringing the case here intended to assert a Federal right."

In R. R. *v.* Homestead Co., 123 U. S. 552, in error to the Supreme Court of Iowa, the jurisdiction of the court was sustained. In that case the defense relied upon in the lower court was a certain decree which was pleaded in bar of the then present action. To that the plaintiff replied that the decree or judgment was void, because the United States court rendering it had no jurisdiction. There were also other defenses set up. There were two cases which were very similar, — a fact necessary to be

considered in order to understand the language of the opinion. When the cases reached the Supreme Court of Iowa the point was not mentioned in the printed brief filed in one of the cases. One oral argument was made for both cases, and from the matter so presented, and notwithstanding a rule of the Supreme Court of the State that nothing would be considered except what was presented in the printed briefs and arguments, this court sustained the jurisdiction, saying: —

> "The record in that (the companion) case taken in connection with that in this shows that the answer setting up the former adjudication, the reply thereto, and the assignment of errors on this point were the same in both cases. They differed in their facts only in that Mrs. Litchfield was not actually a party to the former suit upon the face of the record, and Navigation and Railroad Company was.
>
> "We cannot look upon the reason given by the court below for not considering the question of prior adjudication as sufficient for avoiding the decision of a controlling Federal question fairly presented by the pleadings, proofs and assignments of error and necessarily involved in the determination of the case. *That question stood at the very front of the litigation*, and if decided in favor of the Navigation and Railroad Company ended the whole matter. To give a judgment the other way without considering it was simply to ignore one of the most important elements of the case as it stood in the record. There can be no escape from this conclusion. * * * As it was *the* defense in this case, and if sustained made it unnecessary to consider anything else, we cannot decide that the court was justified in holding that it could not be determined. Such action was in our opinion equivalent to

> a decision against the Federal right which was actually set up and claimed, and thus our jurisdiction for the review of the judgment on this question as well as the others is complete."

It will be noticed that the court there said that there was a controlling Federal question fairly presented by the pleadings, proofs and assignments of error, and necessarily involved in the determination of the case, although the only manner in which such question was presented was by the defendant pleading a decree of the United States court in bar of the plaintiff's action, and the plaintiff by reply denying the legal effect of such decree because the United States Court had no jurisdiction. Certainly the allegations in the case at bar, as clearly, as unmistakably, and as specially assert and invoke the immunity from liability for attorneys' fees under the law governing Federal courts, as was the Federal right invoked in the case just referred to.

This court farther said in that case: —

> "It seems from the opinion, which as part of the record we must take notice of, that this case was argued in connection with that of the Administrator of Mrs. Litchfield. * * * In the oral argument, there being but one for the two cases, this point was raised and discussed; but in the printed briefs it was referred to only in that entitled in the suit of the administrator of Mrs. Litchfield."

I mention this to show that in that case the court relied practically altogether upon the opinion of the Supreme Court of the State, which is a matter I will refer to a little later on.

In the case of Bridge Proprietors *v.* Land and Improvement Co., 1 Wall, 116, in error to the Court of

Errors and Appeals of the State of New Jersey, the court sustained its jurisdiction over the case, although there was no specific reference to or claim of any Federal right or immunity. One company claimed an exclusive right under a certain statute. Another claimed a similar right under a subsequent statute, which subsequent statute was in turn attacked as impairing the contractual rights arising under the first statute. This from the report appears to have been all that the record disclosed, but when the jurisdiction of this court was assailed plaintiff in error contended that under the pleadings in the case the validity of the latter act mentioned was drawn in question, as being contrary to the provision of the United States Constituton declaring that no State shall pass any law impairing the obligation of a contract. On the other hand, it was objected that the pleadings did not in words say that the statute was void because it conflicted with the Constitution, and did not refer to any special clause of the Constitution. Mr. Justice Miller, stating the opinion of the court, first asserted that the court must take judicial notice of the Constitution of the United States without its being specially pleaded, and if the parties in their pleading make a case which necessarily comes within some provision of that instrument the court must recognize the fact without requiring the pleader to say in words: "This paragraph of the Constitution is the one involved in this case." The same may fairly be said concerning the laws of the United States and the rules and the practice governing proceedings in the Federal courts, and the rights arising thereunder, and when the pleadings of the case clearly show that the controversy between the parties, including both the right of the plaintiff to recover if at all, and the right of the defendant to resist the recovery arises out of an authority exercised under the United States, by a court of the United States, and involves the true construction of the rights, lia-

bilities and immunities given and prescribed by the law governing such court, then clearly this court should take notice of that without its being specially stated in terms that "this right is a Federal right," or "this defense is invoking a Federal immunity." Proceeding in that case, Mr. Justice Miller approvingly quoted the rules laid down by Mr. Justice Story in the case of Crowell *v.* Randell, 10 Pet. 368, as to what was necessary to bring the case within the 25th Section of the Judiciary Act, as follows:—

> "1st. That some one of the questions stated in that section did arise in the State court.
>
> "2d. That the question was decided by the State court as required in the same section.
>
> "3d. That it is not necessary that the question should appear on the record to have been raised and the decision made in direct and positive terms, *ipsissimis verbis*, but that it is sufficient if it appears by clear and necessary intendment that the question must have been raised and must have been decided in order to have induced the judgment.
>
> "4th. That it is not sufficient to show that the question might have arisen or been applicable to the case unless it is further shown in the record that it did arise and was applied by the State court to the case."

He farther referred to the ruling of Judge Catron in the case of Armstrong *v.* Treas. of Athens Co., 16 Pet. 281, and approvingly said:—

> "Referring especially to the manner in which the question on which the jurisdiction must rest shall be made to appear, he lays down six different modes in which that may be done. The first of these is 'either

by express averment or by necessary intendment from the pleadings in the case.' The sixth is 'that it must appear from the record that the question was necessarily involved in the decesion, and that the State court could not have given the judgment or decree which they passed without deciding it.' Now although there are other decisions in which it is said that the point raised must appear on the record, and that the particular act of Congress or part of the Constitution supposed to be infringed by the State law ought to be pointed out, it has never been held that this should be done in express words, but the true and rational rule is that the court must be able to see clearly from the whole record that a certain provision of the Constitution or act of Congress was relied on by the party who brings the writ of error, and that the right thus claimed by him was denied."

Again, in the case of Furman *v.* Nichol, 8 Wall. 44, in error to the Supreme Court of Tennessee, the jurisdiction of the court was sustained against the contention that the Federal right was not specifically claimed in the State court.

Mr. Justice Davis, delivering the opinion of the court, said: —

"It is enough for the purposes of this suit to say that a cause can be removed from a State court to this court under the 25th section of the Judiciary Act of 1789 whenever some one of the questions expressed in it is relied on by the party who brings the case here, and when the right he claims it gave him was denied to him by the State court. It is urged that the particular provision of the Constitution which the plaintiffs in error say has been violated in its application to

their case should be contained in the pleadings, but this is in no case necessary. If the record shows either by express averment or by clear and necessary intendment that the constitutional provision did arise, and that the Court below could not have reached the conclusion and judgment which it did reach without applying it to the case in hand, then the jurisdiction of this court attaches, and it need not appear that the State court erred in its judgment. It is sufficient to confer jurisdiction if the question was in the case, was decided adversely to the plaintiffs in error, and the court was induced by it to make the judgment which it did."

These citations are sufficient, I think, to enable me to present my reasons for contending that in the case at bar we have brought ourselves fully within the rulings of this court, and that under such rulings the writ of error properly issued and the court should entertain jurisdiction of the case, and reverse the judgment of the Kansas City Court of Appeals.

It is true that some of the cases referred to involved the validity of State statutes, while some of them did not, but certainly a question is as much a Federal question if it arises from invoking protection or immunity under authority of the United States as it is if it arises from an attack upon a statute of a State, and it does not seem that any more formality or particularity in stating the claim should be made in the former case than in the latter. In fact, if there is any difference, it would seem from the nature of the different controversies that greater particularity should be required in the case of an attack upon a statute of a State. It may well be said that a general charge of invalidity of a State statute or a general attack that it was unconstitutional, is insufficient, because it may be true that the law

attacked is invalid because of some provision of the State Constitution as well as that it may be void because it violates some provision of the Federal Constitution. Therefore, particularity of statement may be required to show clearly that the party was relying upon a violation of the Federal Constitution, so that it might unmistakably appear that he was claiming a violation of a Federal right, whereas in a case where the party is asserting or seeking immunity under some provision of a Federal law or through some authority under the United States, there can be no question about the reliance being upon the Federal law or authority, and whatever is sufficient to show that reliance is placed upon a law or authority of the United States unmistakably shows a claim based upon the law or authority of the United States, and therefore necessarily raises a Federal question. I submit that if it once appears that dependence is being placed upon a law or authority of the United States, — if such law or authority is at all invoked as a defense in a case, — it necessarily involves the effect of such law or authority of the United States, and thereby presents a Federal question, and whatever does do this much ought, I submit, to be held as sufficient to raise the question which thus becomes necessary to a determination of the case, without the necessity of designating it in terms as the assertion of a Federal right or immunity.

I think the cases already referred to establish the proposition that what is essential to the jurisdiction of the Supreme Court in a writ of error to the highest court of a State is that the Federal question relied upon must have been brought to the attention of the highest court of the State that could pass upon the case, in such a manner as to inform that court that it was called upon to decide that question, and that it did decide it either in express terms or by necessary implication in its judgment, that no particular form of asserting such claim is necessary so long as

it unmistakably appears that the question was presented for determination, and that no matter how vague may be the form and manner in which the question is presented, if the State court did understand that it was presented, and the decision upon the question was necessary to the final judgment in the case, that is sufficient. I think this is a just conclusion to be reached from the opinion of this court in the case of Oxley Stave Co. *v.* Butler Co., 166 U. S. 648, when that court after denouncing as insufficient the general terms by which it was claimed the Federal question was presented, said: —

> "If it appeared that the Supreme Court of the State regarded these general allegations as asserting such Federal right or immunity, and denied the claim so asserted, our jurisdiction could be sustained, but it does not so appear."

Likewise, in the case of C. B. & Q. R. R. *v.* Chicago, 166 U. S. 226, the court said: —

> "It is sufficient if it appears from the record that such right was set up or specially claimed in the State court in such manner as to bring it to the attention of that court."

From others of the cases, as Your Honors will discover from reading them, it is sufficient if it appears from necessary intendment that the question was presented, or if the right or immunity under the law or authority of the United States is so involved in the case itself that it could not be decided without the court passing upon such law or authority.

I therefore submit that upon the strength of these authorities it is a fair deduction to say that in a

suit wherein the petition alleged the pendency of an action at law, in a Federal court; the giving of an injunction bond in a suit in equity in the same court, to restrain such action at law; the dissolution of the injunction; and the claim of a right to recover damages consisting of attorneys fees upon such bond; and wherein the answer admitted the giving of the bond under such circumstances; and alleged that the equity suit in which the injunction was granted was necessary to enable the defendant to make its defense in the United States court to the action at law mentioned in the petition, and denied every other allegation in the petition, including the right to recover damages of the kind specified, — then the law which fixes the measure of recovery is necessarily involved in that case, and if the rule which is to so fix the measure of the liability upon such bond is the law of the United States courts, if it arises out of the rules governing the practice in such courts, or arises under the authority of the United States exercised through such Federal court, then that law or rule of practice or authority of the United States is so involved in that case as that it is necessarily all the time presented to the court for its consideration and adjudication. No court could properly decide such a case without considering and determining the effect of such laws, rules or authority, and without adjudicating upon the rights or immunities arising from or under them. By necessary intendment this Federal question was in this case from the inception, and no judgment was rendered or could be rendered in the case without an adjudication upon such Federal question. The bond itself did not state what damages might be recovered.

As alleged in the petition, the condition of the bond was: —

> "Now if the said Missouri, Kansas & Texas Railway Company will abide the decision which may be

made in said case No. 2092, upon said injunction, and shall pay all sums of money, damages and costs that shall be adjudged against it if the said temporary injunction shall be dissolved, then this obligation shall be void; otherwise to remain in full force and effect."

The petition then alleged the dissolution of the injunction; that the plaintiff had expended and incurred liability for a large amount for attorneys' fees, and then alleged, as a breach of the bond, that the defendant had failed to pay the plaintiff such damages. It was necessary to turn to something outside of the bond to ascertain what damage it was that the makers of the bond had contracted to pay in the event of the dissolution of the injunction. The plaintiff, conceding that the Federal court, where the bond was given, did not recognize attorneys' fees as proper damages upon an injunction bond, yet insisted that the measure of the damages was to be ascertained by the rule that the State courts applied to bonds given in injunction suits in State courts, whereas the defendant denied such claim and contended that the damages were to be measured by the rule prevailing in the Federal court where the bond was given. Certainly this contention presented a Federal question which must have been determined in order to properly decide the case. But what we are now concerned with is when was such conflicting contention presented. If it was never presented until this time of course the case can not now be reviewed by this court, — but if it was made in the State courts before the first decision was reached in the Kansas City Court of Appeals, then it was in time. I do not wish to consume unnecessary time in going over that ground, and only suggest that, from the nature of this question, as above stated, it

must be considered as having been presented to the trial court for its determination, and that in the ruling of that court upon the instructions given and refused, and in rendering the judgment which was rendered it was impossible for the court to have avoided a decision upon that question. It will be noticed, from the brief at page 50 of the Record, that it was expressly stated to the Kansas City Court of Appeals that on the trial in the court below the plaintiff relied upon the case of Wash *v.* Lackland, 8 M. A. 122, as authority for including attorneys' fees as damages, and as overcoming the contention of the defendant that the measure of liability established by the Federal courts should prevail, — thus showing that the same questions were argued and the same authorities presented upon the trial of the case in the Circuit Court as upon the presentation of the case in the Court of Appeals.

But, as already stated, it is not necessary to rest this case upon what was done in the trial court, provided it unmistakably appears that the question was fairly, clearly and distinctly presented to the Court of Appeals prior to the motion for rehearing, and to that I now ask the Court's attention.

Reference has already been made to the "points" presented in the briefs filed in the Kansas City Court of Appeals. The justification for reference to those briefs is to be found in the Code of Practice of Missouri, which will be more fully considered later on. For the present I ask the Court to notice what was submitted in those points and what contentions were made by the respective sides when the case was first submitted to the Court of Appeals. The briefs, which by the practice in Missouri are made the assignments of error and the joinder in error, are printed at length in the record now before this court. In the brief of the appellant in that court, the plaintiff in error here, the following points were made: —

" POINTS AND AUTHORITIES.

I.

There can be no recovery of damages in an injunction suit except on the injunction bond. The right of recovery depends entirely upon the bond.

St. Louis *v.* St. Louis Gas Co., 82 Mo. 349;
Teasdale *v.* Jones, 40 M. A. 243;
Campbell *v.* Carroll, 35 M. A. 640;
Keber *v.* Bank, 4 M. A. 195.

II.

The law in force at the time the bond is made is to be considered as incorporated in it, and a part of the contract.

Mix *v.* Vail, 86 Ill. 40;
2 Am. & Eng. Enc. of Law, 466.

Where there is no statute prescribing the conditions of the bond, they are determined by the rules of the court and the discretion of the chancellor.

Murfree on Official Bonds, Sec. 401;
Newell *v.* Partee, 10 Humph. (Tenn.) 325;
Nolan *v.* Jones, 27 M. A. 502;
Rubelman Hdw. Co. *v.* Greve, 18 M. A. 6;
Teasdale *v.* Jones, 40 M. A. 243;
Kinealy *v.* Stead, 55 M. A. 176, 180.

The bond is a part of the record in the case and of the court in which it is given.

Pickett *v.* Boyd, 11 Lea (Tenn.), 498–503;
Murfree on Official Bonds, Sec. 401.

Therefore the rules and practice in the Federal court entered into and became a part of the bond sued on in this case.

III.

The terms and conditions of the bond sued on must be construed under and determined by either the rules and practice of the Federal court, or by the statute and decisions of Missouri. On either theory the court erred in rendering judgment for plaintiff in this case.

Viewed as a bond subject to the rules and practice of the Federal courts the judgment was erroneous because: —

a. The principal damage allowed was attorney's fees, which are not considered an element of damages on an injunction bond in a Federal court.

Oelrichs *v.* Spain, 15 Wall. 211.

The case of Wash *v.* Lackland, 8 M. A. 122, relied upon as establishing the contrary, does not fairly meet the question. The bond in that case did not contain the same conditions as the bond in the case at bar. Moreover that case wholly ignored the other cases in this State giving the proper construction to be put on the language of the bond, and also the theory of bonds and damages thereon in injunction cases.

b. An attorney's fee was allowed and taxed as costs in the case and paid by this defendant, in accordance with the general practice in Federal courts.

c. No damages were adjudged on the dissolution of the injunction, and under the conditions of this bond there could not be any recovery upon it in any court, or at any time.

2 High Inj., Sec. 1656;
Bein *v.* Heath, 12 How. 168;
Deakin *v.* Lea, 11 Biss. 34."

(Record, pp. 42 and 43.)

Farther on the court will find that these propositions were elaborated before the Court of Appeals, in the following manner: —

" Another objection to the judgment of the court below is that attorneys' fees are not an element of damage upon

bonds given in the Federal courts, and therefore the plaintiff was not entitled to recover in this case.

An injunction bond is as much a part of the proceeding in a court as any other act that may be done in a case, and while the bond may be sued on in any other court, yet the rights and liabilities arising upon it ought to be determined from the terms of the bond itself with reference to the rules of law and practice governing the court by which the bond was required. It is settled by the authorities cited under Point II of the brief that the law in force at the time an injunction bond is given is to be considered as incorporated in it, and as part of the contract. This is a general rule applicable to all contracts. And it has also been decided that where there is no statute prescribing the conditions of a bond, they are to be determined by the rules of the court in which the bond is given or by the discretion of the chancellor. So much is the bond a part of the proceeding in the particular court that it is regarded as a part of the record in that case. In the case at bar the plaintiff sued upon a copy of the bond because the original was a part of the records of the Federal court at Jefferson City, where it still remains. The bond is so far governed by the statute or the rules of practice governing the court in which the bond is given that any conditions or obligations beyond those required by the statute are void, and will not be enforced. This was so held by the St. Louis Court of Appeals in Rubelman Hardware Co. *v.* Greve, 18 M. A. 6, and by this court in Nolan *v.* Johns, 27 M. A. 502. As there is no statute regulating injunction bonds in the Federal courts the rules and practice in those courts take the place of the statute, and everyone giving a bond of that character in the United States court is to be considered as having made the bond with reference to the liabilities and subject to the conditions established and recognized by such rules and practice. The promulgated rules and the rules of law established by the decided cases in those courts must be understood to be incorporated in and to become a part of the contract evidenced by the bond, and therefore the obligation of the maker of the bond or the right to recover by the defendant in the injunction suit is to be determined by the measure of

liability or right created and recognized by the rules and decisions of the Federal courts, and not by the statute of a State designed to regulate similar bonds given in the State courts."

(Record, pp. 48 and 49.)

No matter how feebly it may have been done, yet it was unmistakably argued that the lower court had erred in applying the State law to this bond given in the Federal court instead of the measure of liability established by the rules and decisions of the Federal courts, and that the law of contracts required that the court should apply the law governing in the place and in the court where the bond was given, instead of that prevailing in the court where the bond might be sued upon. Authority was cited to show that when a bond was given in one State and sued upon in another State the law of the State where the bond was given should prevail, and then the relation of the Federal courts to the State courts was likened to that existing between the courts of two States, and it was sought to apply the above rule. The fallacy of the rule adopted by the trial court and invoked by the plaintiff in that court, namely, that the State court as the trial court should apply to this bond given in the Federal court the same rule that it would apply to a bond given in such State court, was attempted to be pointed out by showing that such a rule would give the same contract one meaning and one effect in one jurisdiction and an entirely different meaning and effect in another jurisdiction. Then farther reference was made to the cases which had been relied upon by the plaintiff in the trial court, and which were again invoked in the Court of Appeals, and the effort was made to show wherein they were illogical and not founded in reason. I submit that all this, no matter how far it may have fallen short of having been a convincing argument in the Court of Appeals, can have but one effect, and that is to clearly demonstrate

the fact that the Federal question now invoked and relied upon was urged upon the attention of the Court of Appeals in the original brief filed in that court, and was presented in such manner as that the court could not avoid a decision of that question.

In this connection I also call attention to Point V, of the Respondent's Brief upon the original hearing in the Court of Appeals (Record, p. 60), filed after being served with the appellant's brief, to which I have already directed attention, and before any opinion or judgment whatever was rendered by the Court of Appeals, I quote that point as follows:—

"V.

"Appellant is liable for all damages sustained by respondent in consequence of the suing out of the injunction, which he necessarily incurred in procuring a dissolution thereof, although by the rules of the Federal courts no such damages as are claimed by respondent are allowed by the rules of those courts. It does not follow that appellant is not liable for the attorney's fees and personal expenses of respondent in procuring a dissolution of the injunction because they could not be recovered in the court where the bond was given. Appellant's contention would make an injunction bond, a bond for the costs of the suit only. 'It will not be assumed because the Federal courts did not allow such fees that the sureties contracted with that rule of law in view.' Nor is the amount to be recovered to be limited to the rate at which the fees would be taxed as costs in the Federal courts.

3 Sutherland on Damages, pp. 1110 and 1111;
Mitchell *v.* Hawley, 79 Cal. 301;
Aiken *v.* Leathers, 40 La. An. 23;
Wash *v.* Lackland, 8 M. A. 122, *supra;*
Meyers *v.* Block, 120 U. S. 642, *supra.*"

Thus showing that the respondent's counsel considered that the Federal question was then before the court for its ruling and decision, and that an argument was being presented and authorities cited against the contention in regard to such right under the law or authority of the United States which was being invoked by the appellant. I realize that this Court may hesitate to accept these briefs of counsel in the Court of Appeals as part of the record in the case, coming from that court, but, as already suggested, I hope to be able to satisfy the Court that under the practice in that State, and under the principle of certain decisions in this Court, we are entirely justified in resorting to the briefs to ascertain just what questions were submitted to the Kansas City Court of Appeals for its decision. Without yielding my right to make such reference, I might even concede for the present purpose that the briefs are not to be regarded as a part of the record proper, and are not to be considered by this court at this time, and yet I believe I can establish to Your Honors' satisfaction that the question already suggested as a Federal question was presented to the Court of Appeals at the very inception, and was so understood by that court, and that the question was directly passed upon and determined by that court, and this I will undertake to do by the opinion of the Kansas City Court of Appeals, which, without question, must be considered a part of the record in the case. The cases from which I have already quoted show that this court in many instances has relied upon the opinion of the State court of last resort to ascertain whether or not the Federal question had been presented and had been determined. Such is the effect of Section 15 of Article VI of the Constitution of Missouri, and of Rule 8 of this court. By turning to that opinion in the Record Your Honors will see that Judge Gill, who delivered the opinion of the Court of Appeals in this case, undertook to state the propositions presented

by the appellant for the consideration and adjudication of that court, by saying: —

> "Defendant's objections to the judgment below may be thus stated: First * * * and secondly, it is contended that as the injunction bond was given in a proceeding pending in the United States court the damages must be fixed and determined according to the rules and practice of the Federal courts. That attorneys fees' are not there considered elements of damage in suits on injunction bonds, and that therefore our State court should apply the same rule in suits on bonds given in Federal courts." (Record, p. 66.)

Then, if Your Honors will turn to the second paragraph of the opinion of the Court of Appeals, set forth on page 68 of the Record in this Court, you will find that the specific question was taken up and disposed of by that court in the following language: —

> "II. The second position of defendant's able counsel is also untenanable. His contention is that plaintiff is not entitled, in a suit on this bond, to recover, as an element of damages, the fees paid attorneys in defending against the injunction suit. It is conceded, as a general proposition, that under the laws of Missouri, as announced by its courts, and indeed as decided by nearly every State in the Union, counsel fees are recoverable as damages on an injunction bond. But it is claimed that because this bond was made in a suit at the time pending in the Federal court, no attorneys' fees should be allowed because contrary to the holding of such courts in like cases.
>
> Reason and authority, we think, stand opposed to this contention: —

2 Sutherland on Damages, Sec. 525 (2d ed.);
H. & St. J. R. R. Co. *v.* Shepley, 1 M. A. 254;
Walsh *v.* Lackland, 8 M. A. 122;
Mitchell *v.* Hawley, 79 Cal. 301;
Aiken *v.* Leathers, 40 La. An. 23.

As said by the Supreme Court of California in case above cited: 'Bondsmen, in such a case, cannot be held to have contracted with the understanding that a suit would be brought upon the bond (if at all) in a Federal court, and that their liabilities would be fixed according to the view which that court might be supposed to take of the law. If, for instance, the defendants here and the defendants in the injunction suit were all residents of California (which was probably the fact) an action on the bond could probably not be maintained in a Federal court at all.'

So, in the case at bar, it cannot be said that this defendant and its sureties, when they executed the bond in the injunction suit, contracted with reference to the particular ruling of the Federal courts as to allowing attorneys' fees as damages, for, as already stated, the defendant in the injunction suit might, on a dissolution thereof, proceed against them in the State courts where a different rule prevails and where counsel fees are regarded as a proper element of damages to be assessed on the bond. Judge Bakewell, speaking for the St. Louis Court of Appeals, in R. R. Co. *v.* Shepley, *supra*, uses this language: 'A bond of this kind is to be interpreted by the rules that govern the interpretation of any other contract. If the obligor, when executing it, knew that under the ruling of the Supreme Court of the United States he could not be held by this obligation to pay counsel fees, he also knew that by the interpretation put by the Supreme Court of Missouri upon the same ob-

ligation, in a similar proceeding, he would be held for counsel fees in case of failure to maintain his injunction.' ''

When the Court of Appeals in that opinion thus unmistakably stated what the contention of the railway company was, and thus clearly and unmistakably decided adversely to the contention of the railway company, I submit there ought now to be no question about the Federal question having been raised in proper form and in due time. If we recur to those statements of this court where it is said that what is meant by being specially set up or claimed is that the right or immunity was unmistakably claimed, and that it is sufficient if it appears from the record that such right was set up or specially claimed in the State court in such manner as to bring it to the attention of that court, and that if it appears that the Supreme Court of the State regarded even general allegations as asserting a Federal right or immunity, and denied the claim so asserted, then the jurisdiction of this court upon writ of error would be sustained; if, I say, we may resort to these statements and to the other quotations previously made, as indicating the correct rule to govern in determining the jurisdiction of this court, I submit that the Kansas City Court of Appeals by its opinion has settled the question in favor of the plaintiff in error without the possibility of a doubt, because it has stated the contention in unmistakable terms and has decided against it in equally unmistakable language.

V.

The briefs filed in the Kansas City Court of Appeals constitute part of the record in the case, and justify a resort to them to advise this Court as to what questions were presented to that court for its decision. The statutes and the

rules of the Kansas City Court of Appeals necessary to a proper understanding of this matter are fully set forth in subdivision 3 of Point II of this brief (*ante*, p. 18). Prior to the revision of the Statutes of Missouri in 1889, "assignments of error" were required to be filed in the appellate courts, but under that revision such requirement was omitted. In the brief I have referred to that portion of the Code of Practice relating to practice in the Supreme Court and the Courts of Appeals as being Sections 585 and 593 of the Revision of 1889, but of course cannot be expected to print the statute at length in order to show that it does *not* contain any provision regarding "assignments of error." It will not be contended by opposing counsel that there is any such requirement in Missouri. By Section 2301, however, of the statutes of 1889, an appellant or plaintiff in error in the State of Missouri is required to "make out and furnish the court with a clear and concise statement of the case and the points intended to be insisted upon in argument." This is the only provision of the statute making any provision for presenting to the appellate courts the errors complained of or the points relied upon for a reversal of a judgment.

By the rules of the Kansas City Court of Appeals, also set forth in the brief (*ante*, p. 19) and to be found in the appendix of the reports of that court, the details for a compliance with the above statute are provided. Rule 15 requires that the appellant or plaintiff in error shall file with the clerk of such court five copies of a printed abstract or abridgement of the record "together with a brief containing in numerical order the points or legal propositions relied on, with citation of such authorities as counsel may desire to present in support thereof." Rule 17 provides: "The brief on behalf of appellant, or plaintiff in error, shall distinctly and separately allege the

errors committed by the inferior court, and no reference will be permitted in the oral argument to errors not thus specified." In the Revised Statutes of 1879, being those immediately preceding the revision of 1889, Sections 3764 and 3765 provided for the filing of "assignments of error" and for "joinder in error" in all cases in the appellate courts. These are the sections and the provisions of the Code of Practice which were omitted from the Revision of 1889. The question of practice under this change of the statute was before the Kansas City Court of Appeals in the case of Donnell Mfg. Co. *v.* Hart, 40 M. A. 512. In that case a motion to dismiss the appeal was made, on the ground that no "assignments of error" had been filed in the Court of Appeals. This motion was overruled, the court remarking: "By reference to Article 12, Revised Statutes, 1889, it will be seen that Sections 3764 and 3765, Revised Statutes 1879, have been omitted from the new revision and that it is not now required to assign and join in error more than such assignment may be made by briefs required by Section 2301, Revised Statutes, 1889." Later, in the case of the Mo. Valley Cut Stone Works *v.* Brown, 50 M. A. 407, a similar contention was made as in the preceding case, which was very summarily disposed of by the court in the following language, at page 413 of the report: "Plaintiff makes the point that no formal assignment of errors was made by the appellant. Under our recent statute, this is not necessary."

This condition of the Code of Practice in Missouri, and the interpretation put upon it by the Kansas City Court of Appeals, conclusively shows that there is no other manner in which the appellant can present the points it desires to make in the appellate court in that State, except through the points made in its brief.

The amendment of the Judiciary Act of 1789 by the Act of 1867 afforded this Court the occasion for considering

the new conditions that had arisen in the meantime, from the numerous changes in practice in the various States. Many of the old formalities of Common Law Procedure were either materially modified or abandoned altogether. It was realized that these changes in the methods of procedure in the different States necessarily changed the constituent parts of the "record" of a case, and the old idea of a common law record was probably too restricted to accomplish the purpose intended by the Constitution and the Judiciary Act, with reference to the right and duty of this Court to review the decisions of the highest courts of the several States, and thus this Court, speaking through Mr. Justice Miller, was induced to say, in the case of Murdock *v.* Memphis, 20 Wall. 633: —

"It is probable that in determining whether one of those questions was actually raised and decided in the State court, this court has been inclined to restrict its inquiries too much by this express limitation of the inquiry 'to the face of the record.' Williams *v.* Norris, 12 Wheat. 117; Rector *v.* Ashley (*supra*). What was the record of the case was pretty well accepted as a common law phrase at the time that statute was enacted. But the statutes and new modes of proceeding in those courts had changed and confused the matter very much since that time.

It is in reference to one of the necessities thus brought about that this court long since determined to consider as part of the record the opinions delivered in such cases by the Supreme Court of Louisiana. R. R. Co. *v.* Marshall, 12 How. 165; Cousin *v.* Labatut, 19 How. 202. And though we have repeatedly decided that the opinions of other State courts cannot be looked into to ascertain what was decided, we see no reason why, since this restriction is removed, we should not so far examine those opinions, when properly authenticated, as may be useful in determining that question. We have been in the habit of receiving the certificate of the court, signed by its Chief Justice or presiding officer on that point, though not as conclusive; and these opinions are quite as satisfactory, and may more properly be treated as part of the record, than such certificates."

This language was quoted and adopted with approval by this Court in the case of Gross *v.* Mortgage Co., 108 U. S. 477, and in the latter case the Court, speaking with reference to the opinion of the State Court in the case then before it, said:—

"We cannot, therefore, doubt that in the existing state of the law it is our duty to examine the opinion of the Supreme Court of Illinois in connection with other portions of the record, for the purpose of ascertaining whether this writ of error properly raises any question determined by the State court adversely to a right, title or immunity under the Constitution or Laws of the United States and specially set up and claimed by the party who brings the writ. Any difficulty existing upon this subject is removed by that provision of the Revised Statutes of Illinois which requires not only that the Justices of the Supreme Court of the State shall deliver and file written opinions in cases submitted to it, but that such opinion shall also be spread upon the records of the court, 'such opinion shall also be spread upon the records of the court.' This statutory provision was simply to bring the case within the rule which permits an examination of the opinions of the Supreme Court of Illinois, to ascertain whether the case was determined upon any ground necessarily involving a Federal question within the reviewing power of this Court."

In view of the soundness of the reasons suggested in these opinions, the Court finally adopted Rule 8, which makes the opinion of a State court part of the record, at least for this purpose. These cases and this rule show that it is not the policy of this Court to so restrict its inquiries as to exclude any reasonably proper sources of information. When the words "on the face of the record" were eliminated by the amendment, accomplished through the act of 1867, the Court was given the latitude to determine from what sources it would obtain correct information as to whether or not a Federal question had been so presented and decided as to authorize a review of the case upon writ of error from this Court. The

real purpose of the Court evidently is to resort to those portions of the proceedings in the State court which may be regarded as reliable sources of correct information upon the subject. While it is true that, generally, this Court has said, ever since the views expressed in the cases quoted from, that the briefs and arguments of attorneys are not to be considered as part of the record for this purpose, yet that was said with reference to cases coming from courts where the briefs could in nowise be considered as portions of the record. In the State of Missouri, as just shown, by the amendment of 1889 the practice in the appellate courts was so far modified as that no such paper as an "assignment of error" was longer required in the appellate courts of that State. Under the old practice, and under the practice prevailing in many places, and still prevailing in this Court, "assignments of error" must be filed in order that the Court and everyone concerned may know just what contentions are made and just what propositions are to be submitted and passed upon. There can be no question that formerly these "assignments of error" would constitute part of the record in the case, and undoubtedly there would be nothing in the case, and no part of the record in the case, that would more clearly and certainly point out and determine what questions were presented for the consideration of the Court. It does not follow, of course, that the Court *decided* every proposition or contention presented by the "assignments of error." That must be determined from the opinion and the judgment of the court, — but unmistakably, we cannot find any better source of information as to what points are *made*, or what questions are *presented*, than by turning to the "assignments of error" in those cases where the practice of filing the same prevails. Under the present practice in Missouri, however, there is no such step in the proceeding

under the particular designation of "assignments in error," but there is in fact the same thing through a different requirement and under a different name. That is, the statute, and the rules of court, made by virtue of other sections of the statute, require the appellant or plaintiff in error to file a printed brief at a specified time, in which *the points relied upon for a reversal of the judgment must be set forth in numerical order*, to which may be added a citation of authorities relied upon in support of the same. This is so similar to the former requirements for filing formal "assignments of error," that if it had never been passed upon in the State courts, we ought to have no difficulty in reaching the conclusion that these points made and presented in the brief of counsel are equivalent to, and are filed in lieu of, and are intended to take the place of, the old formal "assignments of error." But we are not left to urge upon the Court our own views of the proper construction of the present statutes, nor as to the true meaning and effect of the change which omits any requirement of formal "assignments of error," and instead requires the filing of a brief with points set forth in order, as above stated, because the Kansas City Court of Appeals, whose judgment is now before this Court for review, has determined that question, and in the cases above cited has decided just what we contend, namely, that the briefs of counsel setting forth the points relied upon and the authorities cited in support of them, take the place of the old "assignments of error," and, as was said in the case of Donnell Mfg. Co. *v.* Hart, *supra*, "It is not now required to assign and join error, more than such assignment may be made by briefs required by Sec. 2301, Revised Statutes, 1889." If nothing more is required by the Code of Practice of Missouri, and if, consequently, nothing more is done in a case in one of the appellate courts of that State, how else can we expect to learn what contentions were made by an

appellant or plaintiff in error, or how otherwise can we know what questions were presented to the court and what claims were made as a ground for the reversal of the judgment of the lower court? In view of this condition of the Code of Practice in Missouri, and in view of what this court said with reference to the opinions of the State Courts, even before the adoption of Rule 8, I submit that whether we may properly say that the briefs of counsel are strictly part of the record or not, yet they must be so far regarded as part of the record as to justify a resort to them, along with the other parts of the record, to ascertain what questions were presented to the State court for its consideration.

In the case at bar there can be no question about the propositions and the points which were submitted and made in the Kansas City Court of Appeals, because the plaintiff in error here, — appellant there, — specifically stated, as a reason for reversal of the judgment of the Circuit Court that the right of recovery depended entirely upon the bond sued upon; that the liability under that bond was to be measured by the laws in force at the time and place that the bond was made; that, it having been made in the Circuit Court of the United States, the bond was a part of the record in that court; that the rules and practice, and the law of liability on such bond, as prevailing and applied in that court, entered into and became a part of that bond; that since attorneys' fees were not an element of damages, according to the law and rules of practice in the Federal court where the bond was given, they could not be recovered in this case; — the appellant even went so far as to give the reasons why the authorities relied upon by the other side were insufficient and should not be followed (Record, pp. 42, 43 and 48–52). Then the respondent in that court came in with his brief, and in Point V thereof stated his contention against the position of the appellant, and

cited in support thereof the very authorities relied upon by the Court of Appeals in its opinion (Record, p. 60). As there was no other assignment or joinder in error than as shown in these briefs, and for the reasons already given, if the court will, as I submit it should, consider these briefs for the purpose of ascertaining what questions were presented in the Court of Appeals, there should be no hesitation in saying that the plaintiff in error unquestionably urged upon the lower court, as a reason for reversing the judgment, the very question which it now relies upon as the Federal question in this case.

By way of recapitulation I submit farther that, even independently of what is shown by the briefs, the pleadings, themselves, which beyond all dispute are part of the record, necessarily involved this question: that when the plaintiff alleged the making of a bond in an injunction suit pending in the United States court, and farther alleged a breach of the bond, in that plaintiff in the injunction suit had not paid him the amount of attorneys' fees which he had expended or incurred with reference to that injunction suit, and claimed the right to recover the same in such action upon that bond, and then when the defendant in that case, by way of answer, although admitting the execution of the bond, denied the right of the plaintiff to recover the damages which he claimed, there ought to be no hesitation in saying that every question involved in ascertaining whether or not the plaintiff was entitled to recover at all, or in measuring the damage that he might recover upon such bond, was necessarily involved in the trial of that case; and when the defendant prayed the declarations of law which it did, it specifically presented every element necessary to the plaintiff's case, and every question necessary to be determined in deciding that case; and therefore there was brought before the trial court, both by the pleadings and the instructions, the

question that a party who gives a bond in an injunction suit pending in one of the Circuit Courts of the United States, is entitled to immunity from liability for attorneys' fees incurred by the opposite party in such case, by reason of the rules of law and practice prevailing in that court, which entered into and became a part of the contract evidenced by the bond; and when such defense was made it was invoking a right and an immunity under an authority exercised under the United States.

But we may pass by even all of these matters and recur again to the opinion of the Kansas City Court of Appeals, itself, which, as we have already shown, clearly recognized that it was called upon to adjudge between the parties concerning this right and immunity, which the defendant, plaintiff in error here, claimed under the authority of the Circuit Court of the United States, because of the law prevailing in that court at the time the judge of the court required the bond to be given. That there may be no mistake that the Court of Appeals did consider that such question was presented for its decision, I again quote from the opinion as follows: —

"It is contended that as the injunction bond was given in a proceeding pending in the United States court, the damages must be fixed and determined according to the rules and practice of the Federal courts; that attorneys' fees are not there considered elements of damage in suits on injunction bonds, and that therefore our State courts should apply the same rule in suits on bonds given in the Federal courts" (Record, p. 66); and farther on as follows: —

"His contention is that plaintiff is not entitled in a suit on this bond to recover, as an element of damages, the fees paid attorneys in defending against the injunction suit. It is conceded, as a general proposition, that under the laws of Missouri, as announced by its courts, and indeed as decided by nearly every State in the Union, counsel fees are recoverable as damages on an injunction

bond. But it is claimed that because this bond was made in a suit at the time pending in a Federal court, no attorneys' fees should be allowed, because contrary to the holding of such courts in like cases. Reason and authority, we think, stand opposed to this contention." This is certainly conclusive that in the question which the plaintiff in error now relies upon to give this court jurisdiction was understood by the Kansas City Court of Appeals to have been submitted to it for its decision, and that it did decide it is equally conclusively shown by the subsequent portion of the opinion in which that court gives its reasons for denying the contention that the present plaintiff in error made in that case.

Therefore, we must say that the question was presented to and decided by the Kansas City Court of Appeals, adversely to the contention of the plaintiff in error, and we must also conclude, as previously shown in this brief, that the question is a Federal question; that the right and immunity claimed by the plaintiff in error was one that arose from the exercise of authority under the United States by one of the courts of the United States; that it is the result of the law as adopted, declared and enforced by the courts of the United States, that attorneys' fees are not to be regarded as an element of damage. There can be no logical conclusion reached in regard to the subject, unless we say that this rule of law entered into and became a part of the bond here sued upon. If it were not so, then the power of the United States courts to determine what sort of obligations they will require when granting injunctions, is absolutely taken from them. It is within the power of every party who may have a right to sue upon an injunction bond which the United States court may require from his adversary, to bring a suit upon it, as was done in the present case, for a sum too small to permit a removal to the Federal court, and thus a party to a bond or to the suit in which it is given may, at his own will, enforce a liability upon the bond contrary to the

theory that the Judge of the United States court had regarding it. It is only fair to say that when the Judge of the United States court requires an injunction bond be given in a case pending before him, as the condition upon which he will grant an injunction, he means to impose a liability, in case of a failure to maintain the injunction, in accordance with the law as he understands it, and as it would be applied in his court. But when the party from another State has given such bond, and is afterwards sued upon it, he cannot remove the case if the damages claimed do not exceed $2,000.00. If the amount sued for was in excess of $2,000.00, he might remove the case to the Federal court, where it is conceded by the defendant in error, and by the Kansas City Court of Appeals, there could be no recovery on account of attorneys' fees, which it must also be conceded would be in accordance with the obvious intention of the judge who required that bond; and yet that intention will be thwarted, and the will of the court where the bond is given will be defeated by merely reducing the amount below $2,000.00, and thereby prevent a removal to the United States court, — thus bringing about the anomalous result that the same bond means one thing in one court and an entirely different thing in another court; that it authorizes a recovery of attorneys' fees in a State court, but does not authorize such recovery in a United States court. And again, if by chance the parties should be citizens of the same State at the time an action was brought upon the bond, then there would be no right of removal, even though the amount claimed was greatly in excess of $2,000.00; and in that event, according to the decision of the Kansas City Court of Appeals in this case, the party would be entitled to recover, while if, perchance, either party was a resident of another State then the suit might be brought in or removed to the United States court, and then there could be no recovery. Thus the

contract would be made to mean one thing in favor of a citizen of Missouri, for intance, namely, that he might recover, whereas with reference to a citizen of Kansas or some other State, he could not recover. Certainly the law never intended any such construction of a contract which contemplates such inharmonious results. Since a contract made in obedience to the order of the Circuit Court of the United States should not be forced into such absurd possibilities, and since the authority of the United State court, exercised through one of its courts, should not be subjected to such ridicule as that, the only means of correcting it in such a case as the one at bar is through a writ of error from this Court to the State court.

For these reasons I submit, in conclusion, that the Court must hold that the case involves a Federal question; that it was properly presented in due time in the Kansas City Court of Appeals, and that the decision of such question was adverse to the plaintiff in error, and therefore the judgment of the State court should now be reversed.

Respectfully submitted,

GEO. P. B. JACKSON,

For Plaintiff in Error.